

## **EXHIBIT A**

*Qwest Communications Corporation v. Superior Telephone Cooperative, et al.*

**Public (Redacted) Version of Qwest Communications Corporation's Initial Post-Hearing Brief**

**Public Redacted Version of Qwest Communications Corporation's Responsive Post-Hearing Brief**

**Redacted - Proposed Finding of Facts and Conclusions of Law Prepared by Qwest Communications Corporation**

**STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD**

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**IN RE:**

**QWEST COMMUNICATIONS  
CORPORATION,**

**Complainant,**

**v.**

**SUPERIOR TELEPHONE COOPERATIVE, *et*  
*al.*,**

**Respondents.**

**DOCKET NO. FCU-07-02**

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· PUBLIC (REDACTED) VERSION OF  
QWEST COMMUNICATIONS CORPORATION'S INITIAL POST-HEARING BRIEF

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## **I. INTRODUCTION**

This case presents a study in greed causing a few businessmen to ignore their moral compass when they stood to gain tens of millions in unjustified dollars. Qwest Communications Corporation (“Qwest”) caught the Respondent local exchange carriers (“LECs” or Respondents) charging unlawful terminating switched access on calls to business partners (free calling service companies, “FCSCs”), and caught some Respondents (Superior, Riceville and Reasnor) charging such fees on tens of millions of minutes they did not even terminate. As this Brief summarizes, the record indisputably shows these switched access charges are unlawful as tariff violations and as unjust and unreasonable practices.

Even before Qwest filed its complaint with the Board, traffic pumping brought out the worst in the Respondent LECs. The business relationships they created with the FCSCs conflict with their local tariffs, ignore the purpose of access charges, upset the rural ILEC community which has been preaching the importance of access charges for decades, and gave the FCSCs millions of dollars in kickbacks with no consideration of any obligation to pay Iowa taxes or fees. Many of the LEC Respondents (Merchants, Great Lakes, Superior, Dixon, Riceville and Aventure) even went so far as partnering with pornographers, who generated hundreds of millions of minutes of “free” pornographic calling with no technological measures to protect children.

When Qwest challenged the legitimacy of traffic pumping and the LEC Respondents realized they may have to refund their ill-gotten millions, the LEC Respondents’ conduct went from bad to worse. The facts presented at hearing show a pattern of creating back-dated invoices and contracts; an effort to hide the truth from regulators; the manufacture and falsification of evidence; attempts to use an FCC decision the LEC Respondents knew was procured through fraud; and receipt of millions of dollars in unjustified payments from the Universal Service Fund. Traffic pumping thus bears all the hallmarks of the illegitimate scheme it is.

The Iowa Utilities Board should issue a decision that sends a clear and unequivocal message that traffic pumping violates Iowa law, the LEC Respondents’ local tariffs, is inconsistent with legitimate access charge payments, and is an unjust and unreasonable practice contrary to the public interest.

## II. STATEMENT OF THE CASE

In February 2007, Qwest filed a Complaint against the eight Respondents – Iowa local exchange carriers (six incumbent LECs, “ILECs,” and two competitive LECs, “CLECs”) – for engaging in an illegal “traffic pumping” scheme. Qwest named as Respondents: Superior Telephone Cooperative (“Superior”); Farmers Telephone Company of Riceville, Iowa (“Riceville”); Farmers & Merchants Mutual Telephone Company of Wayland, Iowa (“Merchants”); Interstate 35 Telephone Company (“Interstate 35” or “I35”); Dixon Telephone Company (“Dixon”); Reasnor Telephone Company, LLC (“Reasnor”); Great Lakes Communication Corp. (“Great Lakes”); and Aventure Communication Technology LLC (“Aventure”). Great Lakes and Aventure are the CLECs, while the other Respondents are ILECs. As the hearing evidence showed, the scope of the scheme is astronomical. Through scores of FCSCs, the Respondents pumped traffic in excess of *4 billion minutes* between 2005 and 2007 alone.

While each of the LEC Respondents has their own unique twist on how to perpetrate the scheme, traffic pumping necessarily involves a few common elements. The LEC Respondents partner with FCSCs. These FCSCs are based in, for instance, Los Angeles, California; Las Vegas, Nevada; Salt Lake City, Utah and other large metropolitan areas. The FCSCs use conference bridges, chat line computers, and routers in Iowa. The LEC Respondents assign the FCSCs telephone numbers, and the FCSCs use websites (and advertising on traditional media such as television and radio) to encourage people from Iowa and throughout the nation to call the Iowa numbers to receive the FCSCs’ calling services “free” of charge. This allowed people to obtain free conference calling, free international calling and free pornographic calling (over 25% of the Respondents’ pumped traffic was pornographic). Qwest, AT&T, Sprint and other interexchange carriers (“IXCs”) would then deliver their long distance customers’ calls to the Iowa LECs.<sup>1</sup> The LEC Respondents bill the IXCs for these enormous volumes of traffic using the extraordinarily high interstate (5 - 13.7 cents per minute) and intrastate (approximately 9 cents per minute) switched access rates that they filed in individual tariffs deliberately for traffic pumping

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<sup>1</sup> Unless specifically noted otherwise, while Qwest refers in general to the Respondents’ traffic pumping conduct toward Qwest, the Respondents’ conduct was the same toward all IXCs. Therefore, the same arguments apply to the intervenors in this case, AT&T and Sprint.

purposes, after dropping out of the NECA traffic sensitive pool.<sup>2</sup> The Respondents were aware that the FCC and the Board had allowed such high rural LEC access rates to support basic local service to Iowa rural communities, premised upon the assumption that rural LECs receive very low traffic volumes due to the small number of end users in their rural exchange areas, which are expensive to serve.

The LEC Respondents would kickback a portion of those access charges (interstate and intrastate access alike) to their FCSC partners. The FCSCs' very existence is premised upon obtaining those kickbacks. Traffic pumping has spawned an entire cottage industry of "free" calling companies and brokers to match FCSCs with LEC partners, because the LECs could only charge their high access rates for two years before being required to either rejoin the NECA pool or cost-justify their rates. Had the ILECs stayed out of the NECA pool longer than two years, they would have been forced to recalculate their rates with actual volumes produced by traffic pumping thereby lowering access rates from in excess of five cents per minute to fractions of a penny (*e.g.*, Riceville would have been 0.2 cents per minute).

Based on these facts, Qwest's Complaint states several claims regarding Respondents' unlawful access charges, unlawful revenue sharing, violation of the public interest, and to the extent the Board finds the FCSCs were customers (a finding Qwest vehemently disputes), then also unlawful discrimination among customers. Indeed, in setting this case for hearing, the Board held that "[t]he complaint is docketed for investigation of the matters asserted in the complaint and such other issues as may develop during the course of the proceedings." May 25, 2007 Order. The facts Qwest has uncovered in discovery show that no matter how one looks at this traffic pumping scheme, it is illegal.<sup>3</sup>

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<sup>2</sup> Initially, traffic pumping was performed by ILECs opting out of NECA. However, the FCC effectively stopped that prospectively in *In re Investigation of Certain 2007 Annual Access Tariffs*, 22 F.C.C.R. 16109, 16118, 16120 ¶¶20, 28 (Rel'd Aug. 24, 2007). As a result, traffic pumping has shifted to rural CLECs, such as Great Lakes, Aventure and Omnitel. The reason for the shift is simple. Ron Laudner of Omnitel did a calculation, and if he continued using an ILEC, the access rate would be [REDACTED]. Tr. at 1916-1919; Exhibits 957, 961 and 962. Thus, to thwart traffic pumping, the Board should address the rural CLEC issues head on.

<sup>3</sup> "Through this action, QCC [Qwest] seeks to stop the Respondents from engaging in their illegal, unfair and fraudulent practice of obtaining terminating switched access charges from QCC [Qwest] to which the Respondents are not entitled. .... This 'traffic pumping' scheme – which has caused significant injury to

The LEC Respondents' access tariffs (intrastate and interstate alike) provide for payment of access charges only when (1) calls are delivered to an end-user customer of the LECs' local exchange tariffs, (2) the calls are terminated at the end-user's "premises," and (3) the calls must terminate in the LEC Respondents' certificated local exchange area. The evidence shows that all of the LEC Respondents fail to satisfy the first two requirements, and some of the LEC Respondents fail to satisfy the third requirement as well.

The facts also show that traffic pumping and the millions of dollars of illegally billed-and-collected access charges generated through participation in the scheme have led to a series of wrongful actions some of which are independently illegal, and all of which are unjust, unreasonable and contrary to the public interest. For example:

1. All of the LEC Respondents failed to bill FCSCs for any services, including a variety of local exchange services, collocation and power;

██████ Merchants, Dixon, I35, and Reasnor all issued virtually identical back dated invoices and contracts, all of which suggested that the invoices had issued contemporaneously. ██████

\_\_\_\_\_

[illegible]

\_\_\_\_\_

1

3. Riceville could not handle the volume of traffic into its exchange. As a result, it pretended to be switching and routing the traffic into Riceville, but instead, allowed the traffic to be switched in the Rudd exchange, where Riceville is not certificated. However, Riceville continued to claim credit for the traffic because otherwise the money would have gone into the NECA pool.

QCC [Qwest] – constitutes a violation of several Iowa statutes and common law principles.” Complaint ¶1.

4. Likewise Superior acted and billed QCC as though it had switched and terminated the traffic, but in reality they did nothing but [REDACTED], which is owned by the same two individuals as Great Lakes. Then Great Lakes charged QCC and other IXCs Superior's 13.6 cents per minute rate, rather than the Great Lakes 5.3 cents per minute, [REDACTED] for participating in the fraud. Indeed, Superior had no relationship of any kind with the FCSCs, let alone an end-user relationship. As a cooperative, Superior was not allowed to provide service to anyone located outside their certificated exchange area.

5. Great Lakes, in addition to the scheme with Superior, is a CLEC that only serves FCSCs. It has no outside plant, and offers no actual phone service. All of its facilities are in Spencer, Iowa, a location where they are not certificated. Moreover, the competing ILEC in Spencer is Qwest Corporation, so Great Lakes must cap its tariffed access rates at Qwest Corporation's access rates, unless Great Lakes (a) competes with Qwest, and (b) only serves customers based in rural areas. Great Lakes fails to satisfy either requirement.

6. Aventure is another CLEC that only served FCSCs for the first two years of its existence, never competed with Qwest, and serves FCSCs out of Sioux City (a non-rural exchange), yet charges IXCs as if Aventure only serves rural customers. Moreover, Great Lakes obtained for itself over \$3 million per year in USF contributions, by knowingly misrepresenting that they were serving actual customers in a multitude of rural exchanges, none of which was true.

7. Reasnor came into existence after the exchange was sold to Gary Neill by Sully Telephone Company. When it sold the Reasnor exchange, Sully had nearly reached the end of two years in its relationship with its FCSC partner -- One Rate Conferencing. After the sale of the exchange, the conference bridges used by One Rate [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] ] Thus, Reasnor and Sully conspired to knowingly and wrongfully generate illegal revenues.

8. Riceville, Merchants, Dixon, Adventure, Great Lakes and Superior all entered into business relationships with pornographers. These LECs did nothing to follow the federal laws in place to that require technological measures to protect minors from accessing such content. Many of these LECs knew some of their FCSC traffic was adult content based, and still did absolutely nothing to prevent the services from being available to children, or in a manner that the adult-content nature is identified on the telephone owner's bills from its LEC.

These are just some of the improper actions uncovered in the thousands of pages of evidence presented to the Board through pre-filed testimony and during hearing. Given this volume of evidence and issues, this brief could be literally hundreds of pages long and still not include all of the facts from Qwest's testimony and exhibits. Therefore, Qwest notes that the collective testimony of Jeff Owens – which for the most part went unrebutted – explains the issues and facts LEC by LEC, FCSC by FCSC. The testimony of Lisa Hensley Eckert explains many public interest issues and facts. The testimony of Anne Hilton explains how Qwest discovered the scheme. The testimony of John Devolites spells out the magnitude of the damages the LECs' scheme caused to Qwest, and how Qwest has mitigated its losses on wholesale long distance to Respondents. Finally, the testimony of Max Phillips explains how the Respondents' traffic pumping violates the public interest, is contrary to the long-standing, legitimate practices of most of the Iowa telecommunications industry, and also explains the Board's authority to stop traffic pumping. Qwest's brief simply highlights some of the key points of these witnesses'

testimonies and exhibits, and shows that each of the theories Respondents have proposed to justify their traffic pumping are baseless.

Indeed, since the facts plainly are against them, the LEC Respondents have attempted to find ways to prevent the Board from fully evaluating the facts. The LEC Respondents have argued an artificially narrow view of the Board's jurisdiction, ignoring the actual scope of authority granted by the Iowa Legislature and recognized by the relevant federal law. Respondents also have misinterpreted and misapplied FCC decisions (most particularly the issues from the October 2007 decision that the FCC is reconsidering in *Merchants*; and *AT&T v. Jefferson*) as binding precedent. Respondents do so despite knowing that their arguments have been rejected each of the several times that they have raised them to the Board and several courts. In sum, the LEC Respondents have no defense. As a result, they plead poverty, saying they have already spent all of their ill-gotten gains. No company, certainly not a public utility held in the public trust, should be able to defraud others of millions of dollars with no consequence. Unless the Board sends a very strong message, the incentive to perpetrate such schemes will be worth the effort to LECs, no matter how illegal the conduct is.

Accordingly, in this brief, Qwest sets forth:

- The Board's relevant jurisdictional authority;
- Respondents' numerous violations of tariffs and law, including the law as it stands based on the FCC's decisions in other traffic pumping cases;
- Respondents' unjust and unreasonable practices, in violation of the public interest, particularly as it relates to pornographic or adult-content calling services, and to the purposes of rural access charges; and,
- That Respondent Reasnor's counterclaims against Qwest fail.

The Board should find for Qwest and grant it the relief it seeks, including, but not limited to, refunding improper intrastate access charges, issuing a series of declaratory rulings, and finding traffic pumping illegal and improper in Iowa. Qwest has more than proven its case, and the Board should so hold.

### **III. JURISDICTIONAL ANALYSIS: THE BOARD HAS FULL AUTHORITY TO ADDRESS TRAFFIC PUMPING.**

From the outset of the case, the LEC Respondents have done everything in their power to keep the Board from hearing the evidence, claiming the Board had no ability to stop the LEC Respondents' illegal conduct. Indeed, the LECs' primary arguments did not go to the merits of the scheme, but instead claimed that their scam involved primarily interstate traffic, and therefore the Board was powerless to act. The LEC Respondents filed motions to dismiss, motions to strike, and refused to provide responses to discovery claiming the Board did not have authority to hear the evidence or decide issues in the case. Each and every time, the Board ruled against the Respondents on these jurisdictional arguments, and in its Orders stated Qwest's discovery requests "were reasonably designed to elicit information regarding the issues raised in its complaint and that *the Board has jurisdiction to hear all of these issues.*" July 3, 2007 Order at 5 (emphasis added). *See also* Order of August 16, 2007, and Orders of November 26, 2008 (denying Motion to Exclude Evidence and Motion to Strike). Now that the Board has heard the evidence, it is apparent why the LECs did everything in their power to hide the facts from the Board. The facts show a consistent and willful disregard for the law, the LECs local tariffs, the LECs access tariffs, the switched access regime, and any concept of fairness.

A review of the law makes it equally apparent that the Board has complete authority to regulate the conduct at issue in this proceeding, and to stop this outrageous conduct. The Board is obviously well aware of its statutory authority; however, given that the LEC Respondents have challenged the Board's authority to hear this case, it merits discussing the Board's authority in some detail.

#### **A. The Board's Statutory Authority to Regulate Local Exchange Carriers.**

The Iowa Legislature has vested the Board with clear authority to regulate Iowa LECs, including small rural LECs, in their provision of local and access services in and for the public interest. Moreover, it is undisputed that the Board – not the FCC – has jurisdiction to regulate the LECs as local exchange carriers, including the statutory requirements to file and follow local exchange tariffs. *See, e.g.*, Iowa Code §§ 476.1 ("The utilities board ... shall regulate the rates and services of public utilities to the extent

and in the manner hereinafter provided.”); 476.2 (“The board shall have broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth.”); 476.3 (LECs must charge in accordance with tariffs, and providing for complaint actions before the Board regarding “the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter”); 476.4 (“Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished, on April 1, 1963, which rates and charges shall be subject to investigation by the board as provided in section 476.3”); 476.5 (“No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage”); 476.11 (on complaint, Board determines terms and procedures for toll connections); 476.29(1), (9) (Board authority over certifications); 476.101 (Board authority over CLECs). *See, e.g.*, 199 IAC § 22.1(1). Thus, the Board has direct authority over the LECs’ provision of services, certificates of public convenience and necessity, state tariffs, local tariffs, competition in Iowa, the public interest, providing reasonable standards for communications services in Iowa, the use of numbering resources, and ensuring that LECs do not discriminate among different customers or service categories. The above authority is clearly implicated in this case: by traffic pumping to inflate access charges, the Respondents have abused their certificates as LECs and their state tariffs. *See also, infra* at Section V.B (regarding the Board’s authority as to the CLEC rural exemption).

Section 476.3 is but one example of a provision that provides the Board authority to hear each of the claims in Qwest’s Complaint and to grant the relief that Qwest seeks:

A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the board. When there is filed with the board by any person or body politic, or filed by the board upon its own motion, a written complaint requesting the board to ***determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter***, the written complaint shall be forwarded by the board to the public utility.... When the board, after a hearing held after reasonable

notice, finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, ***the board shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced.***

Iowa Code § 476.3(1) (in relevant part; emphasis added).

The Board's authority extends equally to CLECs. Specifically, Section 476.101 provides the Board with authority over the CLEC Respondents:

A competitive local exchange service provider shall not be subject to the requirements of this chapter, except that ***a competitive local exchange service provider shall obtain a certificate of public convenience and necessity*** pursuant to section 476.29, ***file tariffs ... file reports, information, and pay assessments*** pursuant to section 476.2, subsection 4, and sections 476.9, 476.10, 476.16, 476.102, and 477C.7, and ***shall be subject to the board's authority with respect to adequacy of service, interconnection, discontinuation of service, civil penalties, and complaints.***

Iowa Code § 476.101(1) (in relevant part). The Board has express authority to hear complaints of the exact type raised in this case. *Id.* at § 476.101(5). Moreover, the Board has already found that CLECs have market power with respect to their access charges, and as such, Chapter 476 regulation applies to CLECs' access services. *In re South Slope Coop. Tel. Co.*, 2008 Iowa PUC LEXIS 72 \*7-8 n.4 (Iowa PUC Feb. 13, 2008) (citing *In re: FiberComm, L.L.C., et al. v. AT&T Communications of the Midwest, Inc.*, "Final Decision and Order," Docket No. FCU-00-3 (October 25, 2001)).

The Board's own rules also make plain that the Board has full authority to decide this traffic pumping dispute. Specifically, all Iowa LECs are subject to the following Board rule:

- a. To allow fair competition in the public interest*** while ensuring the availability of safe and adequate communications services to the public.
- b. To provide uniform, reasonable standards for communications service*** provided by telephone utilities.
- c. To ensure that the regulated rates of local exchange utilities ... will be reasonable and just.***
- d. To ensure that no telephone utility shall unreasonably discriminate among different customers or service categories.***

199 IAC § 22.1(1) (emphasis added).

In sum, the powers granted to the Board to oversee and manage the issues that are being abused in traffic pumping are virtually unlimited, because the foundation of traffic pumping is premised upon the LECs abusing the very points that the Board has direct authority to regulate. Traffic pumping depends upon the LECs failure to adhere to local exchange tariffs, and the inducement of illegal kickbacks, all in violation of law and all well within the Board's regulatory province. For instance, the LECs' switched access tariffs – both intrastate and interstate – only allow the LECs to charge switched access on calls delivered to end users purchasing local exchange services under local exchange tariffs. Similarly, many of the LECs are violating their certificates by charging for switched access when the calls never even enter their local exchange area, let alone terminate in their local exchange area. Finally, the LEC Respondents use their exorbitant sums generated from interstate and intrastate access alike as a basis to kick back monies to their FCSC partners, and thus illegally discriminate between purported end-users. *See, e.g.*, Complaint ¶19 (result of traffic pumping is “abuse [of] their exclusive ownership of their switched access services to collect enormous switched access revenues”). The Board clearly has jurisdiction to hear the issues presented by this case, and as set forth in this brief.

**B. The Respondents' Status as Small Carriers Under Section 476.1 Does Not Deprive the Board of Any Relevant Statutory Authority for the Issues Raised in This Case.**

At the very onset of this proceeding, the LECs argued that the Board did not have authority to hear this case, because the LECs are small and have less than 50,000 access lines. However, the express terms of the statute only exempts the small carriers from “the rate regulation provided for in this chapter.” Iowa Code § 476.1. It does not exempt the LECs from the Board's regulatory authority in any other aspect, such as the Board's jurisdiction to regulate their provision of services, tariffs, certificates, discrimination, public interest, etc. The Board also retains authority over the Respondents' access services:

[T]he Board agrees ... that the rate regulation exemption in Iowa Code § 476.1 excuses qualifying ILECs from having their retail rates established by the Board through traditional regulation, but does not exempt LECs from every provision in Chapter 476 that might pertain to specific rates. The Board finds that § 476.1 does not exempt ILECs from complying with § 476.11, which grants the Board authority, upon complaint, to regulate carriers' interconnections with respect to toll traffic and necessarily includes the

switched access services toll providers must purchase to originate and terminate most interexchange calls.

*In re Iowa Telecommunications Ass'n*, 2007 WL 4135212 (Iowa U.B.), Dockets TF 07-125, TF 07-139 (Rel'd Nov. 15, 2007). *See also In re: MCIMetro Access Transmission Services LLC, d/b/a Verizon Access Transmission Services v. Iowa Telecommunications Services, Inc.*, Docket FCU 08-6, 2008 WL 4948752, \*17-19 (Rel'd Nov. 14, 2008) ("Allowing Verizon's complaint to go forward will be consistent with previous decisions in which the Board asserted jurisdiction over the access rates charged by RLECs and CLECs. It would be an absurd result to read the price regulation statutes to mean that of all local exchange carriers in Iowa, only Iowa Telecom's access rates are not subject to review by the Board."); *AT&T Communs. of the Midwest, Inc. v. Iowa Utils. Bd.*, 687 N.W.2d 554, 559 (Iowa 2004) ("the IUB's authority under Iowa Code section 476.11 was broad, general, and comprehensive for telephone companies in Iowa. \* \* \* Indeed, as the IUB points out, other statutes impose an affirmative duty on the IUB to assure that tariff rates are lawful and will foster competition. Iowa Code §§ 476.1, 476.95(2)."). It would be equally absurd if the Board were unable to stop and forever prohibit a fraudulent switched access scheme perpetrated by a small LEC that operates only due to the privilege of the Board's certification.

In sum, the Board has full authority to address and determine all aspects of the Iowa traffic pumping scheme, without overstepping into the FCC's jurisdiction over interstate rates and tariffs.

**IV. QWEST'S CLAIM FOR TARIFF VIOLATIONS: RESPONDENTS' TRAFFIC PUMPING VIOLATES THEIR SWITCHED ACCESS TARIFFS BECAUSE THE TARIFFS ONLY PERMIT SWITCHED ACCESS CHARGES WHEN CALLS ARE DELIVERED TO AN END USER, AN END USER'S PREMISES, AND ARE TERMINATED IN THE CERTIFICATED EXCHANGE.**

**A. The Board Has Authority Over the LECs' Local Tariffs, Intrastate Access Tariffs, and Can Hear Relevant Evidence Relating to Their Federal Tariffs.**

The Iowa Code and the Board's rules give the Board several other statutory bases of authority to address the issues in this case. The Board has full authority to oversee, interpret and enforce the LEC Respondents' state tariffs – both local exchange and intrastate access. Iowa Code §§ 476.3 ("A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with

the board;” on complaint action or *sua sponte*, Board can investigate failures to follow tariffs and enforce tariffs); 476.4 (“Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished ... which rates and charges shall be subject to investigation by the board as provided in section 476.3...”); 476.5 (“No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs...”); 476.11 (Board authority regarding all toll connections, i.e., intrastate access charges); 199 IAC § 22.14(2)(a) (persons providing intrastate access must file intrastate access tariffs with the Board); 199 IAC § 22.15(2) (intrastate access is obtained through tariffs, unless agreement re access service exists between the LEC and IXC). *See also City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 529 (Iowa 2008) (Section 476.4 requires “a public utility to file tariffs with the IUB ‘showing the rates and charges for its public utility services,’ and requires the IUB to promulgate rules for the filing of tariffs.”).

The Board’s authority over the local exchange (or general) tariffs means that the Board has the power to rule that the Iowa LECs had no tariffed basis on which to charge Qwest for switched access. This is because the LECs’ FCSC partners must be “end users” under the LECs’ local exchange tariffs before the LECs can assess switched access charges (intrastate and interstate) on the long distance carriers. *See infra* at Section IV.B.<sup>4</sup> Thus, to the extent the FCSCs are not “end users” as defined by the local exchange tariffs, they cannot be “end users” under the intrastate and interstate switched access tariffs. The Board has unique authority to determine whether the FCSC partners are or are not the LEC’s local exchange customers, and thereby to address the traffic pumping issues raised in this case regardless of the type of calls that were pumped – intrastate, interstate or international.

From time immemorial, local exchange carriers’ state certifications and customer relationships under local exchange tariffs have been used to charge both intrastate and interstate calls. And, the Board has authority over the public interest, local services, certification and much more. To the extent the Board

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<sup>4</sup> The Respondents’ tariffs, and how the Respondents’ arrangements with FCSCs do not meet their tariff definitions, are discussed in detail *infra*, Section IV.B.

pulls a LEC's certification, the LEC cannot operate in the state. That does not mean the LEC can continue to operate in Iowa purely as an interstate provider. The state's delegation of authority to the Board recognizes that, while these regulated entities are located in specific exchange areas in Iowa, they may be using their state certifications and tariffs as the underlying basis to engage in interstate conduct. Therefore, Section 476.15 grants the Board the full extent of power to regulate, consistent with federal law.

The Board's exercise of its authority over the Iowa LECs is also fully recognized as appropriate in the federal law. The Communications Act provides for a joint "cooperative federalism" for regulation of telecommunications, expressly stating in several sections that the state commissions retain extensive authority to regulate. For example, Section 253 provides in relevant part:

No State ... statute or regulation, or other ... requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(a),(b). The actions which Qwest asks the Board to take in this case are perfectly consistent with section 253.

Several sections of Title 47 in fact recognize the state commissions retain authority to regulate local exchange carriers in any manner that does not conflict with federal law.

The IUB found that the [access] tariffs at issue in this case did not apply to the type of traffic involved in this dispute, namely local traffic. \* \* \*

In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise.

*Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8<sup>th</sup> Cir. 2006), *cert. den'd* 127 S. Ct. 2255 (2007). Much like Qwest argues in this case, in *INS v. Qwest*, the Eighth Circuit found that the Board, in ruling certain traffic was not subject to switched access charges under federal tariffs, had acted

within its statutory power. *Id.* See also *Rural Iowa Independent Telephone Association v. Iowa Utilities Board*, 476 F.3d 572, 578 (8th Cir.2007) (affirmed Board decision that access charges do not apply to transited intraMTA calls); *Alma Communications Co. v. Missouri Public Service Comm'n*, 490 F.3d 619, 626 (8<sup>th</sup> Cir. 2007) (quoting Rural Iowa's holding that Board acted within its authority in requiring LECs to allow customers to make intraMTA calls as local calls); *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 448 (4<sup>th</sup> Cir. 2007) (collecting several sections of Title 47 regarding "role of state agencies ... [as] an important part of the entire regulatory scheme.") Plainly, federal law recognizes that there are many facts and issues concerning LECs' end user relationships and certificates, that the state commissions are in a better position to determine in the public interest.

Thus, States' continuing exercise of authority over telecommunications issues forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so.

*Id.* at 449.<sup>5</sup>

It is unquestioned that the Board has authority to hear all issues concerning local exchange tariffs, intrastate access tariffs, discrimination, and whether the LECs are acting consistently with the public interest (among others). The LECs argue that the Board is without jurisdiction to interpret federal tariffs, or to set interstate access rates. As an initial matter, the LECs argument ignores that most of the Respondents have concurred in the ITA intrastate access tariff, which in turn adopts virtually all of the language in NECA Tariff No. 5 (the interstate tariff in which the Respondents have concurred). Exhibit 1 (Owens Direct) at 62, 64, 65, 68; Exhibit 36 (ITA Tariff) at p.3 § 1.1. Therefore, the Respondent's intrastate access definitions are located in the interstate NECA Tariff No. 5. Thus, to interpret the intrastate access tariff, the Board must interpret NECA Tariff No. 5.

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<sup>5</sup> See also Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L.Rev. 1692, 1732 (2001) (quoted in *Bell South v. Sanford*, "where the FCC does not mandate a national approach to interpreting and applying the Telecom Act, state agencies are left with considerable flexibility to do so, albeit subject to federal court review."

Qwest also asks the Board to consider terms within the federal tariff as further evidence that the LECs recognize their FCSC are not end-user customers under the LEC's local exchange tariffs. For instance, the LECs' interstate access tariffs state that "common lines" (a requirement of access charges) must be ordered from the LEC's local exchange tariffs, and that EUCL charges must be imposed on all end users under the local exchange tariffs. The Board has full jurisdiction to decide that the FCSCs did not order a "common line" under the local exchange tariff. Similarly, the Board can determine that the LECs' failure to bill EUCL is additional evidence the FCSCs are not end-user customers under the local exchange tariffs. Even if the LECs intrastate tariffs did not incorporate NECA, the Board actually has authority to interpret federal law and tariffs when necessary to perform its own regulatory function. (*see e.g., Iowa Network Servs. v. Qwest Corp.*, 466 F.3d 1091, 1096 (8th Cir. 2006); *In re Iowa Telecommunications Services, Inc., v. South Slope Cooperative Tel. Co.*, 2007 Iowa PUC LEXIS 15, 6-9, Docket No. FCU-06-25 (Iowa PUC January 23, 2007)). It is beyond peradventure that the Board has the necessary authority to consider evidence from the federal tariffs, and to make factual findings that will impact the LECs on both an intrastate and interstate level.

In sum, the Board has full jurisdictional scope to hear and address all of the following violations of Respondents' switched access tariffs.

**B. Switched Access Requires a Local Exchange End User, End User Premises, and Termination Within the LEC's Certificated Local Exchange Area For Which it Billed the Traffic.**

One of the primary issues in this case is whether the calls at issue qualify for switched access charges under the LEC Respondents' respective access tariffs. It is black letter law that the LEC Respondents can only charge switched access charges on calls that qualify under the switched access tariffs. *See, e.g., Teleconnect Co. v. USWEST Communications, Inc.*, 508 N.W.2d 644, 647-648 (Iowa 1993); Iowa Code § 476.5; *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 681 (8<sup>th</sup> Cir. 2009). *See, infra* Section IV.I. The interstate and intrastate switched access tariffs both require that (a) calls be to an end-user, (b) delivered to an end-user's premises, and (c) terminated in the carriers' certificated local

exchange before terminating switched access charges can apply. Two provisions of the access tariffs make this plain. First, “switched access service” is defined as follows:

Switched Access Service, which is available to customers for their use in furnishing their services *to end users*, provides a two-point communications path between a customer designated premises and an *end user’s premises*. It provides for the use of common terminating, switching, and trunking facilities and for the use of *common subscriber plant* of the Telephone Company. Switched Access Service provides for the ability to originate calls from an end user’s premises to a customer designated premises, and to *terminate calls from a customer designated premises to an end user’s premises in the LATA where it is provided*.

Exhibit 1 (Owens Direct) at 71-72 (quoting Exhibit 35, NECA Tariff No. 5, Section 6.1, Switched Access Service; emphasis added). Similarly, the tariff definition of “access minute” reads: “On the terminating end of an interstate or foreign call, usage is measured from the time the call is *received by the end user* in the *terminating exchange*.” *Id.* at 262 (quoting Exhibit 35 (NECA Tariff No. 5) at §2.6 (emphasis added)).<sup>6</sup>

No one disputes that calls must be delivered to end-users or to an end-user premises in order to qualify for switched access payments. Tr. at 2568 (Chu Cross-Examination). Indeed, the Board has already ruled that a condition to switched access payments is that calls be delivered to the LEC’s end users:

Access charges are intended to allow local exchange carriers to charge interexchange carriers for connecting *end users* to their chosen interexchange carriers. The right to file a tariff for intrastate access charges must be limited to companies that directly serve the retail customers, or end users.

\* \* \*

In a worst-case scenario, a wholesale service provider in the position of 360networks would claim a regulatory right to receive access charges for calls that the VoIP provider claims are not subject to the Board’s regulatory authority. Again, this record reveals no reason to conclude that this separation of regulatory rights and responsibilities would be in the public interest.

For these reasons, the proper interpretation of the Board’s rule is that access charges can only be collected by local exchange carriers that are actually providing service directly to

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<sup>6</sup> The Respondents’ intrastate access tariffs have the identical definition, because most of the Respondents have adopted the ITA Tariff (Exhibit 1 (Owens Direct) at 62, 64), and the ITA Tariff in turn concurs in the NECA Tariff No. 5. *Id.* at 65, 68 (Respondents’ intrastate access tariffs generally adopt the language of their interstate tariffs, except re End User Access Service and its EUCL charges, and FUSC charges). See Exhibit 36 (ITA Tariff) at p.3 § 1.1.

*end users, that is, to retail customers.* Any other interpretation would be contrary to the public interest and must therefore be rejected.

*In re 360Networks (USA) Inc.*, 2006 Iowa PUC LEXIS 376, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) (emphasis added). Traffic pumping presents something far worse than the “worst case scenario” envisioned in *360Networks*: instead of a carrier claiming the right to access charges on calls outside the Board’s authority, the carriers are assessing access charges on calls they did not even deliver to end-users.

There should be no question that the calls must also terminate in the LEC Respondents’ certificated exchange for terminating switched access payments to apply. The access tariffs, local exchange tariffs and various cases make this plain. First, the access tariffs specifically state that to be an end-user, one must purchase service out of the local exchange tariff. Specifically, the interstate tariff states that the LEC “*will provide* End User Access Service (End User Access) *to end users who obtain local exchange* service from the Telephone Company under its general and/or *local exchange tariffs*.” Exhibit 1 (Owens Direct) at 73-74. Moreover, for switched access to apply, calls must traverse a “common line.” Exhibit 35 (NECA Tariff) and Exhibit 36 (ITA which incorporates NECA) at §6.1 et seq. (switched access charges apply to use of “common subscriber plant” including common line). Common lines can only be purchased from the local exchange tariffs:

The term “Common Line” denotes a line, trunk, pay telephone line or other facility provided under the *general and/or local exchange service tariffs* of the Telephone Company, terminated on a central office switch. A common line-residence is a line or trunk provided under the Telephone Company, terminated on a central office switch. A common line-business is a line provided under the business regulations of the general and/or *local exchange service tariffs*.

Exhibit 35 (NECA Tariff FCC No. 5), Section 2.6, Definitions (Common Line) page 2-65. Thus, the purchase of local exchange services from the local exchange tariffs is required for switched access to apply. Exhibit 1 (Owens Direct) at 82.

Indeed, Iowa law makes plain that the terms of Respondents’ intrastate access tariffs control (and as such, that access charges can only be applied to calls delivered to a customer purchasing from the local exchange tariffs).

*Interexchange utility intrastate access.* Intrastate access to local exchange services or facilities may be obtained by an interexchange utility by ordering and paying for such intrastate access pursuant to the applicable tariff filed by the exchange utility in question, or as otherwise provided by agreement between the parties.

199 IAC § 22.15(2). *See also* Iowa Code § 476.3, 476.5. It is undisputed that the Respondents had no agreements with Qwest for providing intrastate access, and therefore the LECs must rely on their intrastate access tariffs to support their charges.

***The LEC Respondents' local exchange tariffs and the Board's regulations only allow the LECs to provide local exchange service in their certificated exchanges, and the exchanges they serve must be identified in their tariffs.*** Board Member Tanner made this point plain during the hearing: "But the certificate authorizes you to furnish local exchange service in the exchanges shown by your tariffs?" Tr. at 2461-2462. Given that end users must be customers pursuant to the local exchange tariffs, and those tariffs necessarily only apply to calls terminated on facilities provisioned out of those tariffs and in the specified local exchanges, the calls in question must terminate in the certificated exchange in order for switched access charges to apply.

The Modified Final Judgment (MFJ), which first established the access charge structure as a part of the divestiture of the Bell Operating Companies from AT&T, also established this very point – that calls must terminate in the certificated exchange:

***"Exchange Access" . . . shall be provided by facilities in an exchange area for the transmission, switching or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area,*** and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC.

*United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (emphasis added).

Thus, switched access charges cannot apply to the extent that (a) the FCSCs are not end-users of the LEC Respondents' local exchange tariffs; (b) the calls were not delivered to an end-user's premises; and (c) the calls did not terminate in the LEC Respondents' certificated exchanges. If any of these requirements are missing, switched access cannot apply. At hearing, Qwest has proven (as is summarized below) that all of the LEC Respondents fail to satisfy the first (end-user) and second (end-user premises)

points, and many of the LEC Respondents fail to satisfy the third-requirement (termination in a certificated exchange) as well. As a result, Qwest asks the Board to issue a decision finding as follows:

- A declaratory finding that FCSCs are not end-user customers under the LEC Respondents' local exchange tariffs;
- A declaratory finding that the FCSCs are not end-users under the LEC Respondents' intrastate access tariffs;
- A declaratory finding that the FCSCs are carriers;
- A declaratory finding that the FCSCs are business partners or joint venturers, and not end-user customers;
- A declaratory finding that the calls delivered to conference bridges/chat line computers/routers used by FCSCs are not terminating to an end-user's premises under the intrastate access tariffs;
- A declaratory finding that to the extent calls are transited through the LEC's exchange to a location outside of the LEC Respondent's certificated exchange, (i) the LEC Respondents are not providing local exchange service on such calls; (ii) the "end-to-end analysis applies and bars application of intrastate switched access charges to such calls; (iii) the LEC Respondents are acting beyond the scope of their certification in violation of Iowa law; and, (iv) the LECs are not terminating the calls; and
- Issue an order requiring the LEC Respondents to refund all of the intrastate access charges billed for calls associated with their FCSC partners, with interest.

C. **The Evidence is Overwhelming that the Respondents' FCSCs are Not "End-Users" Because The FCSCs Do Not Purchase Local Exchange Services Under the Local Exchange Tariffs.**

At hearing, Qwest put forward an overwhelming amount of evidence proving that the FCSCs are not end-users purchasing services pursuant to the local exchange tariffs. Jeff Owens presented an exhibit summarizing the many reasons that the service the FCSCs obtained was not local exchange service. See

Exhibit 1355.<sup>7</sup> These points are stark and many are undisputed: (1) FCSC Service was provided for free; (2) FCSC Service was provided without expectation of payment; (3) FCSC Service included the sharing of access revenues; (4) FCSC Service was not billed monthly as required by tariff; (5) no FCSC has ever made payments to the LEC Respondents on a single invoice (even the back-dated invoices) and none of the Respondents have ever sought to collect; (6) the LECs do not seek to collect late charges for the FCSCs failure to pay for invoices; (7) FCSC Service was not delivered to a customer premise; (8) FCSC Service did not involve the provision of End User Access Service, and its associated End User Common Line (EUCL) Charge, which the LECs' interstate tariffs require to be assessed to all end users who obtain local exchange service from the LECs' local exchange tariff; (9) FCSC Service was provided without applying the Federal Universal Service Charge (FUSC) to any end user services even though it is required by the FCC's rules and the LECs' interstate tariffs; (10) some FCSC Traffic was not delivered to a certificated exchange; (11) international and calling card traffic merely transited through Iowa; (12) [REDACTED]; (13) in some cases, the LEC rendering access bills was not authorized to provide local exchange or exchange access service where the FCSC traffic was 'terminated' (e.g., Great Lakes in the Spencer exchange, Superior in the Spencer exchange, Riceville in the Rudd exchange, and Reasnor in the Sully exchange); (14) some FCSC Service was not switched by an end office switch; (15) FCSC Service did not include dial tone in some if not all instances; (16) FCSC Service allowed partners to place equipment in the LEC's central office; (17) FCSC Service did not charge for use of central office floor space by FCSCs; (18) FCSC Service provided power to the FCSCs' equipment for free; (19) FCSC Service did not involve the payment of taxes by the LEC; (20) FCSC Service did not generate any payments to the USF fund by the LEC; (21) FCSC Service was generally not reported to the FCC, NECA, or the Board; (22) FSCS Service did not include a listing in the directory, or charges for non-published listings; (23) FCSC Service lines were not reported to the 911

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<sup>7</sup> The several rationales for these findings are strewn throughout Jeff Owens' 500 pages of direct and rebuttal testimony. See Exhibit 1 (Owens Direct) and Exhibit 1275 (Owens Rebuttal).

agency, and were not provided with 911 service; (24) FCSC Service was terminated unilaterally by LECs without cause, which the LECs local exchange tariffs prohibit; (25) FCSC Service was not entered into ordering systems, billing systems, accounting systems; (26) FCSCs never received regular communications from the LECs as a local exchange customer would such as billing inserts and, in one example, Sully did not provide notice to One Rate that it was selling the Reasnor exchange; (27) FCSC Service was never publicly noticed, through a tariff or otherwise; (28) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]; and (29) FCSC Service does not satisfy the definition of Telephone Exchange Service. Telephone Exchange Service requires, among other things, that the service be a telecommunications service, which is “*for a fee directly to the public or to such classes of users as to be effectively available directly to the public....*” 47 U.S.C. § 153(26). In summary, the FCSC Services provided by the LECs to their FCSC partners differs from the tariffed local exchange service offered by the LECs in virtually every conceivable way. As Qwest stated above, to the extent the LECs are not providing local exchange service to their FCSC partners, the FCSCs are not end-users and switched access cannot apply. Virtually all of these points went un rebutted; indeed, the LECs admitted point after point at hearing and in deposition.

***I. The LEC Respondents’ Failure to Charge or Expect Payment for Services is Fatal.***

A few of these points merit discussion in greater detail. The first several reasons why the FCSCs are not customers under local exchange tariffs all relate to the LEC Respondents’ failure to bill the FCSCs anything for service. The combined eight LEC Respondents had relationships with over 30 FCSCs, and never once did an invoice actually issue to the FCSCs until the back-dated invoices from mid-2007, after this lawsuit was initiated. Moreover, even as of today, no FCSC has ever made a payment to a single LEC Respondent for purported local exchange services. This is true even though their local exchange tariffs require monthly bills to customers. Exhibit 1 (Owens Direct) at 91-92. This is true even though

the interstate tariffs require EUCL and Universal Service Charges be imposed on each and every end-user under the local exchange tariffs. *Id.* at 61. This is also true even though Iowa law defines “customer” as one who is “responsible by law for payment” for service. 199 IAC §§ 22.1(1), 22.1(3). The facts uniformly show that the LEC Respondents never billed their FCSC partners (until after Qwest filed its FCC complaint against Merchants in May 2007), never received payments from their FCSC partners, never expected payment from their FCSC partners, and never instituted efforts to collect from their FCSC partners. Instead, the LECs offered and provided services to the FCSCs for free. The FCSCs admitted they did not expect to pay for local service, and the LECs did not bill for or collect the fees for local services. Exhibit 1 (Owens Direct) at 47 and at 347-348. Because Iowa law states that customers are entities “responsible for payment”, it is impossible for the FCSCs to be customers. *Id.* at 91. Thus, FCSCs are business partners and not customers.

Moreover, many of the LEC Respondents recognized that the FCSCs were their business partners, not their customers. *Id.* at 47-48. For example, Ron Laudner repeatedly used the term partner to refer to the FCSCs:

[illegible]

Tr. at 1899-1901. In addition, exhibits 963, 1373 and 1374 were also discussed, and referenced the FCSCs as partners. Tr. at 1901-1902. After going through many exhibits, Mr. Laudner changed from saying that he did not routinely call the FCSCs partners, to admitting they were partners:

A. [REDACTED]

Tr. at 1903-1904. See also Exhibit 1 (Owens Direct) at 83-84. This candid testimony makes Qwest's point. The FCSCs are not the LECs' end users; they are business partners with whom the LECs are in business as joint venturers. *Firststar Bank Sioux City, N.A. v. Beemer Enterprises, Inc.*, 976 F. Supp. 1233, 1242 (N.D. Iowa 1997) (under Iowa law, the usual indicia of joint venture include a common undertaking and right to share in profits, citing *Thomas v. Hansen*, 524 N.W.2d 145 (Iowa 1994)); *Ringier America, Inc. v. Land O'Lakes, Inc.*, 106 F.3d 825, 828 (8<sup>th</sup> Cir. 1997) (applying Minnesota law, joint venture is species of partnership). The only end users in traffic pumping are the individual customers of the *IXCs*, who actually make the calls to the Respondents' FCSC partners, pursuant to their long distance service plans with their IXC.

The LECs' response to this consistent and overwhelming failure varies based upon the LEC. Riceville, Superior, and Great Lakes state they netted the charges by decreasing the amounts they paid to the FCSCs in kickbacks. Merchants, Dixon, and Interstate 35 state they netted the charges, but issued back-dated invoices nonetheless. Reasnor states it simply "forgot" to issue bills, and therefore issued back-dated invoices. Finally, Aventure argued that it did issue bills. Every one of these arguments shows

that the LEC Respondents are willing to say and do just about anything – even to the point of supplying testimony lacking any credibility – to try and justify the millions of dollars in unjustified charges they have billed the long distance carriers.

**2. *The LEC Respondents' Theory of "Net" Payments for Local Exchange Service Is Wholly Contradicted By the Total Lack of Documentary Evidence.***

All of the Respondents except Aventure and Reasnor have argued they netted the payments to the FCSCs by paying them less than they would have for their services. In other words, they argue that the FCSCs paid for services pursuant to local exchange tariff, and the payments they made to the FCSCs already factored in this payment. The evidence is absolutely overwhelming that this netting never occurred. For example, with respect to Riceville, Jeff Owens testified as follows:

I expect OmniTel will claim the amount of access charge revenue it shared with its partners reflected the tariffed rates for the telecommunication services it provided to facilitate access sharing/traffic stimulation. But, there is no real evidence to support such a claim. The amount of such 'netting' is not documented, and there is nothing, for example, in the Farmers Riceville – Free Conference Agreement that the telecommunication services provided by Riceville are included or netted into the fees Riceville paid Free Conference. Moreover, no taxes were paid, no USF contributions made, nothing was entered into the billing system, and not one document was generated that suggested a netting process actually took place. It is inconceivable that this netting process took place when there is not one shred of evidence to support the proposition.

Exhibit 1 (Owens Direct) at 180-181 (footnotes omitted). This is true for each and every Respondent. In this entire and voluminous record there is not one scrap of paper, not one hand-written note showing or even suggesting that netting was contemplated. If netting had truly occurred, the LECs' accounting records should reflect it; taxes (excise taxes, sales taxes, etc.) would have been paid; USF surcharges would have been paid; the LECs would have reported their network connections to the FCSCs as access lines in reports to the FCC and to USAC; some data would have been input to billing systems; records of some form would exist. None of the LECs did this even on one occasion.<sup>8</sup>

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<sup>8</sup> Dixon argued that it made corrective filings with NECA in the summer of 2007 to account for its error. Exhibit 923. As an initial matter, this is many months after Qwest initiated this lawsuit thereby showing the conduct was an after-the-fact rationalization. However, even more telling is that Dixon has never paid the hundreds of thousands of dollars necessary to actually rectify the situation. Dixon made a paper filing, but withheld the payments. Tr. at 2142-2144. Any argument that Dixon remedied its error is baseless.

The incredulity of the inherent problems surrounding the concept of netting rationalization is exemplified by the unbelievable testimony of Rex McGuire that he had previously disavowed in his deposition. In his deposition taken in January 2008, Mr. McGuire testified that he had never even considered netting for local exchange service:

[REDACTED]

Exhibit 1 (Owens Direct) at 157-158; (quoting Exhibit 1003 (McGuire Depo.) at 152). His deposition also says that he never even considered [REDACTED] [REDACTED]. Exhibit 1003 (McGuire Depo.) at 151-152. Reversing course, Mr. McGuire's pre-filed testimony says that Merchants had netted charges, without providing any explanation for the discrepancy, Mr. McGuire testified Merchants had netted charges, without any explanation for his reversal. Tr. at 1993 (McGuire Pre-filed Direct). On supplemental direct during the hearing, Mr. McGuire testified that he was confused by the term netting, because he was used to the term "offset." Tr. at 2004. Despite these statements, on cross examination [REDACTED] [REDACTED] [REDACTED]. Tr. at 2049-2055. Then, just minutes later on redirect, he stated that he had netted the service.

During the hearing, the Board recognized that it would evaluate the credibility of witnesses. Tr. at 2104. This netting concept is a perfect example of where the Board should exercise that inherent right. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-395 (Iowa 2007) ("[i]t is the commissioner's duty as the trier of fact to determine the credibility of the witnesses," citing *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 853 -854 (Iowa 1995)). Moreover, in doing so, as with its evaluation of the entire record, "[t]he agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." Iowa Code § 17A.14(5). Other than the verbal testimony of some LEC witnesses, there is no evidence of netting. The lack of any documentation speaks volumes.

The actual documentary evidence contradicts any notion of netting. The LECs all testified that the confidential contracts between them and their FCSC partners constituted the entire relationship between the parties Exhibit 1003 (McGuire Depo.) at 96-97 and at 191. None of the contracts suggest that netting took place. Exhibits 930, 937, 941, 944 and 952. Indeed, many of the contracts state that the FCSCs are getting [REDACTED] Exhibit 1012. Moreover, several FCSCs believed they were [REDACTED]. Exhibit 1165 (Rohead Depo.) at 15-16. Finally, even after this lawsuit was filed, there are no emails or other documents stating that netting had been contemplated. As Mr. Laudner testified:

Q. And when Qwest filed this complaint, you knew that one of the issues from the outset was they're not end users, correct?

A. Correct.

Q. And they're not being billed, correct?

A. Correct.

Q. And there's no e-mails even then to the free calling parties saying, "You know, we've been netting this all along," or anything to that effect, is there?

A. No.

Tr. at 1893. Thus, the Board should see the LECs' argument relating to netting for what it is, an after the fact rationalization to try and justify millions of dollars in illicit payments. Even Lawrence Chu, Superior and Great Lakes' expert, admitted he was "curious" about whether the LECs were involved in after-the-fact rationalizations to try and justify millions of dollars in improper access charge payments. Tr. at 2562-63 and 2595-96.

***3. Respondents' "Netting" Theory Is Further Decimated by Affirmative Proof: Many of the LECs Attempted to Surreptitiously Back Date Invoices and Contract Amendments, to Make it Appear (Falsely) That They Had Been Billing All Along.***

After their schemes were subject to Qwest's complaints here and before the FCC, several of the Respondents tried to conceal the fact that the FCSCs were not customers by creating back dated contract amendments and invoices. Reasnor, Dixon, Interstate 35, and Merchants (and non-Respondent Sully Telephone Association) each engaged in this conduct. The timing of the efforts to back-date, and the failure to promptly produce the documents (which had been requested in discovery), show that these Respondents calculated to mislead the FCC and the Board.

[REDACTED]

[REDACTED]

Exhibit 1 (Owens Direct) at 102. This very point is admitted in the now infamous email from one of the LEC Respondents' lawyers, James Troup. [REDACTED]

[REDACTED]

[REDACTED]

Exhibit 1356, Tab 6.<sup>9</sup>

The problems the LECs faced, however, were more than a mere failure to bill. As Qwest set forth above, the services provided to the LECs' FCSC partners do not contain any indicia of local exchange service. As a result, the LECs recognized they needed to change the terms of the original deal, and to make it appear as though the FCSCs had been end-users all along. As such, the LECs set out on a course to surreptitiously create back dated invoices and back dated contract amendments, all of which gave the outward appearance that they had been issued in the normal course of business rather than after Qwest's complaint.

The complete make-over proved difficult, however, because the LECs' FCSC partners had an expectation of receiving services, including collocation and power, at no charge. For example, One Rate Conferencing's President sent an email to Reasnor's counsel stating [REDACTED] [REDACTED] *See Exhibit 1356, Tab 3.* Despite this (or maybe because of this), Sully and Reasnor proposed a [REDACTED]. *Id.* at Tab 5. The contract amendment contained the date "[REDACTED]" at the top, and the words "[REDACTED]

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<sup>9</sup> For ease of reference, Qwest placed many of the critical documents concerning the back-dating of evidence into one summary exhibit, Exhibit 1356.

[REDACTED]" at the bottom. *Id.* Thus, the plain intention of the amendment was to make it appear that the contract had been executed [REDACTED] [REDACTED] Exhibit 49 (Burns Depo.) at 94-95; 106-107. [REDACTED] [REDACTED] *See Exhibit 1356, Tab 6.* Moreover, Reasnor had already [REDACTED] 2007; thus, the attempts to change the contract occurred after the relationship was over. Exhibit 53.

Almost immediately after these communications, Merchants retained James Troup to represent it before the FCC in a traffic pumping case. Qwest filed that FCC case on May 2, 2007 (Exhibit 1356, Tab 7), and thereafter James Troup [REDACTED]. Tr. at 2056-205. On May 14, Merchants [REDACTED] Exhibit 1356, Tab 12. [REDACTED]. *Id.* at Tab 13. These invoices contain no references that show or otherwise suggest that the invoices were actually [REDACTED]. *Id.* They all give the outward impression that they were [REDACTED]. Tr. at 2060-2061; 2073-2074; 2078-2080. The invoices were first delivered to Merchants' FCSC partners [REDACTED] [REDACTED]. Exhibit 1356, Tab 11.

Despite this, Merchants answered the FCC complaint on [REDACTED] [REDACTED] – and falsely represented to the FCC that the FCSCs were Merchants' end users because they had been billed and paid for several aspects of service:

The conference call companies are Farmers' end users, as that term is defined in Farmers' interstate access service tariff. The conference call companies subscribed to Farmers' interstate service, specifically interstate End User Access Service, and were billed the federal subscriber line charge. *Farmers also billed the conference call companies for local telephone service and for rental of floor space in Farmers' central office where their conference bridges were located.* Therefore, in compliance with its interstate access service tariff, Farmers provided Qwest with terminating access when it delivered calls to conference bridges located in Farmers' local exchange.

Exhibit 1356, Tab 10, page vii.<sup>10</sup>

Simultaneously, Merchants set out to have its FCSC partners [REDACTED]

Exhibit 1356, Tabs 14 & 20. The addenda also had dates of [REDACTED]

[REDACTED] All of the FCSCs were angry about this plan. Tr. at 2062. Even Merchants admits that this was an attempt to [REDACTED] Tr. at 2068-2070; 2075-2076. In addition, these [REDACTED] terminating service. Exhibit 1036; Tr. at 2068-2070. Thus, Merchants attempted to modify the terms of the contract even after the contract had ended.

Just like One Rate, however, some of Merchants' FCSC partners were reluctant to participate in the fraud. Darin Rohead of Powerhouse (broker to Free Conference and other FCSCs) stated that the [REDACTED] Exhibit 1356, Tab 15. Dave Erickson, Free Conference's President had a phone call with James Troup, consulted his own lawyer and concluded that he [REDACTED] Exhibit 1356, Tabs 16-17. Despite this, Mr. Troup encouraged Rex McGuire (General Manager to Merchants) [REDACTED]

[REDACTED] Exhibit 1356, Tab 23. Thus, Mr. McGuire, Mr. Rohead, and Mr. Erickson all saw this for what it was: an attempt to [REDACTED]

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<sup>10</sup> Note, the FCC relied upon this exact false misrepresentation to conclude that the FCSCs were end-users.

Tr. at 2073-2074; Exhibit 1165 (Rohead Depo.) at 241. Despite this, Merchants put forward the [REDACTED]

[REDACTED]. Tr. at 2074-2075.

Not surprisingly, the FCC relied upon the manufactured documents. The FCC issued a decision, finding that the FCSCs were end-users based upon the manufactured evidence:

37. *Farmers asserts that the conference calling companies are customers because they purchase interstate End User Access Service and pay the federal subscriber line charge.* Qwest, however, argues that the conference calling companies nevertheless do not “subscribe” to Farmers’ services “under any meaningful definition of that term.” Qwest asserts that “subscription” requires the payment of money, but that the conference calling companies effectively pay nothing for Farmers’ service because all of their payments are refunded to them in another form – the marketing fees.

38. We find that Farmers’ payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers’ tariff. n121 ... We reject Qwest’s premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers. The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. *The record shows that the conference calling companies did subscribe, i.e., enter their names for, Farmers’ tariffed services.* n126 Thus, the conference calling companies are both customers and end users, and Farmers’ tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

Footnotes:

121 We express no view on whether the conduct at issue ran afoul of any other statutory provisions not raised by Qwest.

\* \* \*

126 See Answer at vii.

FCC October 2007 Decision (*In re Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, FCC 07-175 (Rel. Oct. 2, 2007)) at ¶¶37-38 (notes omitted; emphasis added). See Exhibit 1356, Tab

30. The FCC relied upon Merchants’ Answer at page vii, cited above, which is the evidence manufactured and falsified by Merchants. In granting reconsideration, the FCC acknowledged that it relied upon this false material:

When we ruled on whether Farmers properly charged Qwest terminating access for calls to the conference calling companies, *a key issue was whether those companies were “end users.”* That question, in turn, depended on whether the companies were customers that “subscribe[d] to the services offered under [Farmers’] tariff.” *We found that the conference calling companies did subscribe to services under Farmers’ tariff based on Farmers’ representation that they purchased interstate End User Access Service and*

*paid the federal subscriber line charge.* Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated. In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question. According to Qwest, this backdating indicates that the conference calling companies were *not* Farmers' customers during the relevant time period, but rather were its business partners.

FCC Order on Reconsideration (FCC 08-29) at ¶7 (emphasis added); see Exhibit 1356, Tab 36.

Merchants and its lawyers did not stop its back-dating charade with the FCC, however.

Merchants had Kiesling forward the falsified invoices to Dixon and I35 as well:

[REDACTED]

[REDACTED]

[REDACTED]

Exhibit 1000 (emphasis added). [REDACTED]

[REDACTED]

[REDACTED] See also Exhibit 1356, Tab 13. Dixon and I35 then used [REDACTED]

[REDACTED] Exhibits 924 and 997.

Again, these falsified documents were sent out [REDACTED]. Exhibits 77, 167, 906 and 1153.

The LECs also attempted to perpetuate this fraud on the Board. In response to discovery in this case, the LECs turned over their contracts with the FCSCs, but claimed all other evidence was "irrelevant." *See, e.g.*, Exhibit 1356, Tab 18. The LECs forced Qwest to file several motions to compel. Only after One Rate had produced the evidence [REDACTED], and the Board had ordered for a third time for the Respondents to produce the discovery did the LECs produce any [REDACTED]

[REDACTED]. This occurred in late August, early September 2007 – too late to take the relevant material to the FCC, even had it been possible for Qwest counsel in this case to have then known (prior to the public order October 2, 2007) that Merchants had withheld this material in the FCC proceeding (which has a separate protective order). Then after the FCC decision of October 2, 2007, the LECs all moved to stay this case, arguing that the FCC had decided everything! The LECs did so knowing full well the FCC's decision had been procured by fraud, because they knew that Merchants had not informed the FCC that its "end user" representations were based on its May 2007 attempt to change the FCSC deals with the backdated invoices and contracts. See Exhibit 1356, Tab 31.

Amazingly, the LECs continue to act as though their back-dating scheme was business as usual. Jeff Owens, who has been in the industry for 35 years, sees the scheme for the fraud that it was:

[REDACTED]

[REDACTED]

Exhibit 1 (Owens Direct at 102-103). Similarly, at hearing Board Member Tanner saw the scheme for what it was as well:

BOARD MEMBER TANNER: Mr. McGuire, what is your position with Farmers & Merchants?

THE WITNESS: General Manager.

BOARD MEMBER TANNER: So you are responsible ... for the actions of Farmers & Merchants? Not your attorneys?

THE WITNESS: Yes.

BOARD MEMBER TANNER: Not your consultants?

THE WITNESS: Yes.

BOARD MEMBER TANNER: And you know that lying is wrong?

THE WITNESS: What's that?

BOARD MEMBER TANNER: Lying is wrong.

THE WITNESS: Yes.

BOARD MEMBER TANNER: Would you consider falsifying documents to a federal agency lying?

THE WITNESS: Yes.

BOARD MEMBER TANNER: Is it your testimony here today that that was your attorney's actions and not yours?

THE WITNESS: I guess I signed off on it, I mean.

BOARD MEMBER TANNER: So you knew it was happening?

THE WITNESS: Yes.

BOARD MEMBER TANNER: And you are not trying to say in your testimony today that it was the attorneys who made you do it, are you?

THE WITNESS: That made me do it, no.

BOARD MEMBER TANNER: And if your attorney tells you to do something and you know it's wrong, you still independently know if it's right or wrong, correct?

THE WITNESS: Yes.

BOARD MEMBER TANNER: And your attorneys advice does not absolve you of the correctness-- That's vague. It doesn't absolve your behavior if your attorney told you to do it?

THE WITNESS: Correct, but I assumed when an attorney's put forth the documents and said that this is what we needed to do, they were covering my butt as well their own.

BOARD MEMBER TANNER: So if you needed to do it for the proceeding, it was okay?

THE WITNESS: No, that wasn't what I was meaning. I was meaning that like on the addendums, when it says that it's entered into the date as of, I assumed that that was an acceptable wording.

BOARD MEMBER TANNER: But you knew that it wasn't entered into on that day. Did you understand that?

THE WITNESS: That it wasn't signed on that day, yes.

BOARD MEMBER TANNER: Well, entered into. That said this document was entered into the first date on this contract.

THE WITNESS: Yeah, I guess.

BOARD MEMBER TANNER: Okay. So to go back to what you just said, you thought it was okay, even though you knew it was incorrect, because your attorney told you?

THE WITNESS: Yes.

Tr. at 2085-2087. The Board, of course, should not countenance these LECs' (Merchants, Reasnor, Dixon and I35) knowing manipulations of the facts and the discovery process in order to deceive the decision-makers.

In addition, this backdating activity bears directly on the substantive point that the LECs did not have end user customers to support their access charges, because backdating is additional evidence that the Respondents' "netting" or "off-setting" theories are pure fiction. If the Respondents had always agreed with the FCSCs that they were netting or offsetting the price of local exchange services, why then did the Respondents attempt to obtain back-dated invoices for the entire statute of limitations period? Why did the LECs attempt to obtain back-dated contracts which, by their own admission, changed the terms of the deal? Why were the FCSCs upset by the change? Why were there no emails confirming that everyone knew they had been netting all along? The email from Mr. Troup shows the answer: the LECs' know they [REDACTED]

[REDACTED]

Respondents intended their backdating to deceive the FCC, to deceive the Board, and to deceive Qwest and the other IXC's. Respondents cannot simply claim now that they were just engaging in an

industry standard, as the Respondents tried exceptionally hard to hide the fact that they had backdated. Testimony from Jeff Owens makes Qwest's point:



Exhibit 1 (Owens Direct at 109). Plainly, the netting/offsetting theory is an after-the-fact rationalization generated in litigation in an attempt to justify conduct that is clearly illegal. In other words, it is a lie, with no basis in fact whatsoever.

As shown above, the Board has the ability to weigh credibility in finding the facts. The facts show no netting ever occurred. The facts also show the back-dated invoices and contracts were an attempt to defraud, and conceal the truth. In such circumstances, the Board should make a factual finding that Merchants, Reasnor, Dixon and I35 were engaged in a direct attempt to defraud. The claim that back-dating is an industry norm is unavailing. The Board has already noted in previous orders that backbilling in the industry only pertains to mathematical or calculation errors in a carrier's billing. *In re Exchange of Transit Traffic*, 2002 WL 535299, \*8, Docket No. SPU-00-7, TF-00-275, (DRU-00-2) (Iowa U.B. March 18, 2002), *rehearing den'd* May 2, 2002. The manner in which these Respondents proceeded with the backdating plan was anything but industry norm. As a recent court recent decision makes plain, the LECs cannot rely upon a claim of "industry norm" to justify its illegal back-dating scheme:

Treacy's insistence that granting in-the-money options is entirely legal and thus cannot amount to the predicate activity necessary for liability under those subsections is inconsistent with the 10(b)'s text and purpose. ***If the activity in question amounts to a scheme to deceive, irrespective of its legality, it may be violative. And while backdating is not necessarily illegal, it is not an inherently innocent act either.*** See, e.g., *United States v. Reyes*, No. C 06-00556-1 CRB, 2007 WL 2462147, at \*8 (N.D.Cal. Aug. 29, 2007) ("***There are benign explanations for backdating ... [a]nd there are nefarious explanations for backdating....***"); *Belova v. Sharp*, No. CV 07-299-MO, 2008 WL 700961, at \*1 (D.Or. March 13, 2008) ("Backdating is a form of fraud under federal and state law."); *In re Zoran Corp. Derivative Litig.*, 511 F.Supp.2d 986, 996 (N.D.Cal.2007) (describing the story of stock-options backdating as familiar, the court acknowledged that "[i]n some instances, the grant dates were obviously backdated to maximize returns for the grantees and minimize the compensation expense reported by the company").

*“To deceive means ‘to take unawares especially] by craft or trickery ... to deprive esp[ecially] by fraud or stealth ... [or] to cause to believe the false....’” “ Bongiorno, 2006 WL 1140864, at \*7 ( quoting Webster’s Third New Int’l Dictionary at 584). The court finds that a reasonable jury could deem Treacy’s alleged conduct deceptive; by allegedly backdating the grants to obtain stock options at historically low prices while giving the appearance that such grants had been given at fair market value on the date of the grant, Treacy may have taken advantage of Monster’s shareholders’ and the investing public’s false belief that the company was in better financial health than it genuinely was. Put simply, the government alleges that Monster’s management engaged in a racket whose ingenuity depended on obscurity and subterfuge to manipulate share prices. Thus, the allegations against Treacy encompass conduct that extends beyond misrepresentations or omissions, and the Indictment does not fail.*

*U.S. v. Treacy*, 2008 WL 4934051, 4 (S.D.N.Y. November 19, 2008) (emphasis added).<sup>11</sup> Much as in *Treacy*, these Respondents backdated in order to deceive, and the Board should so find.

**4. Respondent Reasnor’s Claim that it “Forgot” To Issue Invoices Is Not Believable and Contradicts the Record Evidence.**

Reasnor argues that its failure to issue invoices to One Rate Conferencing was simple oversight.

This assertion is completely unbelievable. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].] *Id.* at 60.

Contrary to Mr. Neill’s claims, the facts show Mr. Neill did know at all relevant times that One Rate was the source for the lion’s share of the [REDACTED]

[REDACTED]

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<sup>11</sup> See also *U.S. v. Bello*, 2008 WL 5046857, 3 (D. Utah Nov. 20, 2008) (backdating documents to support claims for reimbursement from the government is unlawful under 18 U.S.C. § 1035, citing *United States v. Vanmeter*, 278 F.3d 1156, 1160 (10th Cir.2002)); *Lynn v. TNT Logistics North America Inc.*, 275 S.W. 3d 304, 310 (Mo. Ct. App. 2008), motion to transfer to Mo. Sup. Ct. *den’d*, Feb. 24, 2009 (backdating of documents to conceal handling of claim of harassment is a factor properly considered in a jury’s award of punitive damages); *Antidote Intern. Films, Inc. v. Bloomsbury Publishing, PLC*, 242 F.R.D. 248, 249 -250 (S.D.N.Y. 2007) (email to counsel, stating that company must have corporate minutes “backdated if necessary,” to show a fictional nom-de-plume was the authorized signer of contracts instead of the actual author, was plainly a request that the lawyer aid in commission of fraud).

[REDACTED]

[REDACTED].] Specifically:

[REDACTED]

[REDACTED]

[REDACTED]

Exhibit 1344 (A. Scholten Depo.) at 118:13-20.

[REDACTED]

[REDACTED]

[REDACTED]

All of this evidence points to the conclusion that the sale of the Reasnor exchange by Sully – and the purchase of that exchange by Mr. Neill – was motivated by the desire of both parties to continue improperly assessing switched access charges on traffic related to One Rate. Reasnor’s theory that it just

overlooked billing One Rate for services is therefore wholly incredible even just looking at Mr. Neill's existing knowledge of One Rate.

Furthermore, additional facts adduced from Sully Telephone regarding its relationship with One Rate establish the falsity of Reasnor's claim that the lack of billing to One Rate was simply a mistake. Before Sully sold its Reasnor exchange to Mr. Neill ([REDACTED])

[REDACTED]

[REDACTED]

[REDACTED].] *Id.* at 55-56. Indeed, despite the fact that Sully's tariff requires monthly billing to customers,

[REDACTED]

[REDACTED] Exhibit 1344 (Scholten Depo.) at 73-74 and 91. And, despite the fact that Sully's local exchange tariff requires customers to pay all rates and charges for local exchange services and facilities, Mr. Scholten admits that [REDACTED]

[REDACTED]. *Id.* at 90:4-16. See also Exhibit 1364 (Sully Local Exchange Tariff) at Part II, Sheet 6,

¶ D-4. Mr. Scholten also concedes there is nothing in the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 93-94. [REDACTED]

[REDACTED]

[REDACTED]. This is confirmed by the fact that the FCC required Sully and Reasnor to notify all customers about the sale of the Reasnor exchange, and One Rate was not notified thereby showing it was not an end user customer. Exhibit 1275 (Owens Rebuttal) at 79-80; Exhibit 1281. Therefore, the facts show that Reasnor's current theory -- that it simply forgot or did not know to bill One Rate -- is false.

After this litigation commenced, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED].] *Id.* at 167-68 and 176-178. Indeed, as is discussed above, Reasnor's counsel, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. Exhibit 1356, Tab 6. One Rate refused to participate in the scam. Indeed, [REDACTED]  
[REDACTED]. Exhibit 1 (Owens Direct) at 60; Exhibit 49 (Burns Depo.) at 42, 108-109. In sum, the evidence shows that Reasnor's failure to issue invoices to One Rate was intentional, and any attempt to claim otherwise is a fabrication.

5. *Aventure's Claim That It Issued Invoices to the FCSCs Is Simply Inaccurate.*

Aventure tries in vain to argue that it issued invoices to its FCSC partners for \$5 per month per line. The facts show this argument is baseless. As an initial matter, Aventure maintains a price list for the services it offers to customers at its offices. *See Exhibit 170*. Nowhere on that list does Aventure have a \$5 per month rate. Thus, the rate being offered to FCSCs is not tarified or otherwise publically offered; Aventure admits as much. Tr. at 2296 & 2300. Moreover, the evidence shows that Aventure never sent invoices to its FCSC partners. Exhibit 1381 is a compilation of all the invoices Aventure created for its FCSC partners. Most of the invoices were delivered to a company called "Network Brokers Corporation," which Aventure admits is a broker, not an FCSC. Tr. at 2291. Aventure merely sent these invoices to the broker and had no idea whether the broker forwarded them on to the FCSCs. Tr. at 2292-93. What Aventure does know is that it has never received payment on a single invoice. Tr. at 2292-93. Qwest subpoenaed several of the FCSCs interfacing with Network Brokers, namely Magellan 21 and Blue Pacific, and they did not produce any invoices from Aventure. Thus, the claim that Aventure was billing its FCSC partners is baseless.

The only FCSC to whom Aventure ever issued an invoice directly was Global Conference. *See Exhibit 1381* at BATES AV-002301-10. As an initial matter, these invoices were created after Qwest filed its complaint here. Tr. at 2294. Close inspection shows these invoices were a sham. In March 2007

(after this litigation had commenced), Aventure was in the process of negotiating a contract with Global Conference. [REDACTED]

[REDACTED]

Exhibit 1382. Thus, Global Conference [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Exhibit 1056 at BATES AV-00210-212; Tr. at 2301. This [REDACTED] was executed March 26, 2007, just days after the email where Global Conference said [REDACTED]. This in and of itself shows the transaction was a sham.

The facts adduced at hearing further bear out this sham. At hearing, Aventure's witness could not recall any consulting services Global Conference had ever provided; indeed, he did not even know who to contact at Global and could not recall the name of a single person at Global. Tr. at 2303-05. When asked to name whom he would contact, Aventure's witness identified Dave Erickson, the President of Free Conference – not Global Conference – an FCSC with whom Aventure did not even have a relationship. Tr. at 2303-05. These are very telling facts that the “consulting” agreement was a sham and Aventure failed to provide local exchange services to its FCSC partners.

**6. Respondents' Contract Tariff Theory Is Wholly Untenable.**

Respondents further theorize that their contracts with FCSCs were actually “contract tariffs,” thereby arguing that this makes the FCSCs local exchange customers even though they did not purchase from the LECs' local exchange tariffs. As an initial matter, many of the LEC Respondents' own witnesses admit they only sell local exchange service from their local exchange tariffs. For example, Ron Laudner of Riceville testified as follows:

Q. And the word exchange is defined as a geographical area established for the administration of local telecommunications services in a specified area, correct?

A. Correct.

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<sup>12</sup> See Exhibit 1301 (Devolites Direct) at 1469, 1473, 1479, 1481.

Q. And you look at exchange area, and it talks about the territory served by an exchange, correct?

A. Correct.

Q. And then you look at exchange ...service. ... And it says, "The furnishing of facilities for communication within an exchange area in accordance with the regulations and charges specified in the local tariff." Do you see that?

A. Yes, I do.

Q. And you were not providing exchange service to any of the free calling parties because you weren't providing it in the exchange area for Riceville, isn't that true?

A. Well, I would only differ--beg to differ on that when I would say furnishing the facilities for communications, and that we did.

Q. It says within an exchange area?

A. I understand.

Q. And it was not within an exchange area for Riceville, was it?

A. No, it was not.

Q. So it is not exchange service as defined by this definition; true?

A. True.

Q. Then you look at local exchange service, the next page, and you see, "Telecommunications within a local service area in accordance with the provisions of the company's tariffs." Do you see that?

A. Yes, I do.

Q. And the services provided to the free calling parties were not within local service area for Riceville; true?

A. True.

Q. And so they were not in accordance with the provisions of your company's tariffs, were they?

A. No, they weren't.

***Q. And Farmers of Riceville only offers local services via its local exchange tariffs; true?***

***A. True.***

Tr. at 1886-87 (emphasis added). Thus, the argument that the contracts between the LEC Respondents and their FCSC partners are "contract tariffs" flies in the face of their own admissions.

Moreover, as a matter of law, these contracts cannot possibly be contract tariffs. Every one of the contracts between the LEC respondents and their FCSC partners is confidential. At hearing, the terms of those contracts could not even be discussed without going into confidential session. This is anachronistic to a tariff, which by definition must be offered to the public at large so all similarly situated customers can partake. Iowa Code §§ 476.3, 476.4, 476.5; 476.101 (CLECs must file tariffs). The Communications Act makes this very point. The law defines a "Local Exchange Carrier" as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). Both "telephone exchange service" and "exchange access" are defined terms. However, "exchange access" is defined as

“the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.” 47 U.S.C. § 153(16). Thus, the definition of exchange access incorporates the definition of “telephone exchange service.” In other words, to be a local exchange carrier, and to provide exchange access – meaning long distance services subject to access charges – a carrier must be providing “telephone exchange service, meaning giving a subscriber the ability to “originate and terminate a *telecommunications service*.” 47 U.S.C. § 153(47)(B) (emphasis added). Thus, to provide local exchange services, a carrier must be providing a “Telecommunications Service,” which is defined as:

Telecommunications Service – means the offering of telecommunications *for a fee directly to the public* or to such classes of users as to be *effectively available directly to the public*, regardless of the facilities used.

47 U.S.C. § 153(46) (emphasis added). Thus, to qualify as a Telecommunications Service, a local exchange carrier must offer the service (a) for a fee, and (b) directly to the public or classes of users.

These foundational definitions make it plain that the LEC Respondents are not offering local exchange services to their FCSC partners. First, they are not offering services for a fee; they are providing services to their FCSC partners at no charge. The fact that no taxes are paid, no mandatory fees (USF etc.) are imposed, and no accounting takes place makes this very plain. In addition, the services are not offered directly to the public. The confidential nature of the relationships, combined with the fact that the Respondents did not make any public offerings – by advertisement, tariff, etc. – makes this plain. Indeed, each of the FCSCs had to negotiate individual deals with each of the LEC Respondents. All else equal, the kickbacks varied from [REDACTED]. The LEC Respondents admit that the deal for each FCSC was often unique. *See* Tr. at 2181-2182 (I35); Tr. at 1986-1990 (Merchants) and Tr. at 1835-1838 (Riceville). Thus, the argument that these contracts constitute “contract tariffs” fails at every conceivable level.

**7. The FCSCs Are Not End User Customers, but Rather Provide “Telecommunications,” which Means Calls to the FCSCs Do Not Qualify for Switched Access.**

The LECs’ intrastate and interstate access tariffs both say: “The term ‘End User’ means any customer of an interstate or foreign telecommunications service *that is not a carrier* . . .” Exhibit 1 (Owens Direct) at 72. Thus, to the extent the FCSCs are carriers, by definition the calls do not qualify for switched access under the LECs’ intrastate and interstate access tariffs. A recent decision by the FCC shows the FCSCs are carriers. *In re Request for Review of InterCall, Inc. of Decision of the Universal Service Administrator*, 23 FCC Rcd. 10731, 2008 WL 2597359 (F.C.C.), FCC 08-160 (Rel’d June 30, 2008) (“*InterCall Decision*”).

On February 1, 2008, InterCall, Inc. filed a request with the FCC to review a decision by the Universal Service Administrator that the “audio bridging” services offered by InterCall are “toll teleconferencing” services that are subject to contributions to the universal service fund (USF) based on revenues from that service. The audio bridging services offered by InterCall are similar in important respects to the conference calling services offered by Free Conference and other FCSCs. In its *InterCall Decision*, the FCC found that InterCall’s conferencing service is form of telecommunications, and required them to contribute to USF as persons providing telecommunications for a fee. *InterCall Decision* at ¶¶13-18. This finding undermines the positions of some conference FSCS, who claim that they are classified as end users by the FCC. Indeed, the FCC expressly states: “We disagree with InterCall’s claims that the Commission has found that conference calling providers are end users for purposes of USF contribution obligations.” *Id.* ¶19. Many conference companies, including Free Conference, have responded to the *InterCall Decision* by notifying customers that they will assess USF charges, and registering with the FCC to do so. See Entry for Free Conference in FCC Form 499-A Telecommunications Reporting Worksheet database, Filer ID Number 827274 at <http://fjallfoss.fcc.gov/cgb/form499/499detail.cfm?FilerNum=827274> (accessed March 30, 2009). Indeed, Free Conference has apparently started making contributions to the USF. *Id.*

Qwest expects that the LECs will argue that Free Conference is not a carrier because it provided services to end-users at no charge. While much of the traffic in this proceeding generated by the FCSCs was for free, portions of it were not. In 2007, 8 to 10 percent of Free Conference's revenues were associated with paid traffic. See Exhibit 969 (Lorenzetti Depo.) at 127. Global Conference testified likewise. Reasnor claims that One Rate is primarily a for-fee service. Tr. at 2746. Thus, at least these three conferencing companies are carriers. Moreover, it is reasonable to conclude the same of the other FCSCs. Moreover, one is not a "carrier" on one call and an "end user" on another. An entity is either an end-user or a carrier. As such, all calls delivered to the FCSCs constitute calls delivered to carriers.

The facts developed at hearing show the LEC Respondents begrudgingly recognize the FCSCs are carriers, not end-users. Over the course of the proceeding, Board Member Hanson picked up the fact that the contracts between the LECs and their FCSC partners are titled "[REDACTED] [REDACTED]." Tr. at 1940. As an initial matter, the Board has already found that access charges can only be assessed when delivered to "retail" end-user customers. *In re 360Networks (USA) Inc.*, 2006 Iowa PUC LEXIS 376, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) ("the Board's rule is that access charges can only be collected by local exchange carriers that are actually providing service directly to *end users, that is, to retail customers.*"). Switched access cannot be assessed to wholesale end-users. *Id.* Moreover, as Board Member Hanson recognized, "wholesale" services are generally those sold to another carrier so they can resell them to the actual end-user, the one using (here) the conference, chat line or international calling services. Tr. at 1942. Ron Laudner recognized that the relationship Riceville had with the FCSCs was a "carrier to carrier relationship:"

BOARD MEMBER HANSON: Typically when I think of wholesale I think of the seller selling something that's not at retail. Selling it to someone else who is going to resell it or remarket it. In other words, I don't see that it--I don't think of a wholesale seller and a retail buyer engaged in the same transaction. If I'm a wholesale seller, I'm selling to somebody who is buying it wholesale. That's how I think of that. So I think of wholesale services as something that one carrier sells to another, or one provider sells to another, and you're saying that's not your understanding of the word "wholesale"?

THE WITNESS: No. That's my understanding of the word "wholesale." I'm not sure that's the understanding of the word "wholesale" in this agreement. I think they mean the reverse of that, that they would provide us the minutes and sell it to us in the payment that we make to them at the wholesale rate.

BOARD MEMBER HANSON: So it is still we're talking about carrier to carrier and provider to provider?

THE WITNESS: Yes.

BOARD MEMBER HANSON: So under that understanding--if that's the relationship between Farmers Riceville and Free Conferencing, how does that end up defining Free Conferencing as a local exchange customer if the contractual relationship is a carrier-to-carrier or provider-to-provider wholesale arrangement?

THE WITNESS: Well, I think much in the way Mr. Holz tried to convey that early on in my testimony. We provide wholesale services to a municipality for the same switching, the same services. They charge their retail rate for—to their end users for providing--or for having that service available in their municipality, but the traffic is hauled back and switched, and switched at the switching center at a wholesale rate that we then charge them.

BOARD MEMBER HANSON: In that relationship you would--it sounds like--I don't want to put words in your mouth, but it sounds like in that relationship you would not consider the municipality itself to be the local exchange customer?

THE WITNESS: Their customers would be the--the customers of the municipality would be the local exchange customers.

Tr. at 1942-44. Ron Laudner later admitted that the municipality he was discussing was a CLEC – a carrier. Tr. at 1962-63. Given that the FCSCs and municipality are identically situated, the FCSCs are admittedly carriers, not end-user customers.

Qwest therefore asks the Board to make a finding as follows:

- The FCSCs are not “end users” under the local tariffs.
- The FCSCs interacting with the LECs are “carriers”, not end user customers.
- Calls must be delivered to end-users to qualify for switched access.
- Calls delivered to carriers do not qualify for switched access under the LEC's intrastate access tariffs.

**D. The Evidence Is Overwhelming that *None* of the Calls in Question Were Terminated to an End-User's Premises in the Respondents' Local Exchange Areas.**

As stated above, the second requirement to bill terminating switched access is that the call must terminate to an end-user's premises. The access tariffs (intrastate and interstate) make this point clear.

*See supra.* The definitions for “premises” are identical in both the interstate and intrastate tariffs:

The term “Premises” denotes a building or buildings on continuous property (except Railroad Right-of-Way, etc.) not separated by a public highway.

Exhibit 35 (NECA Tariff No. 5) at §2.6 (emphasis added)).<sup>13</sup> Thus, the calls in question must be delivered to an end-user's "building or buildings." None of the FCSCs own, lease, or have any recognizable property right in a building or buildings anywhere in Iowa. Thus, they cannot meet this definition.

All of the FCSCs placed equipment in buildings owned or leased by their LEC partners. The FCSCs did not lease space from the LEC Respondents in those buildings and did not pay for power. They simply placed equipment in those buildings. The LEC Respondents argue that the equipment placed in the central office constitutes the FCSC's premises. Tr. at 2467-2469. However, the definition of "premises" does not say "equipment;" it says "building or buildings." Thus, by definition, this must be the end-user's building or buildings. Here, that is never the case.

Of course, it is possible to have a portion of a building or building that is uniquely the customer's. Renting an apartment is one example; collocating equipment in a central office is another. For example, Qwest runs cyber centers (as opposed to central offices) that many high tech companies use to place equipment. [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].] Tr. at 870-871. As Mr. Owens explained, to be a premises, a building or portion of a building must be "owned or controlled" by the end-user:

Q. Do you recall questions yesterday about, Mr. Owens, the concept of end-user premises?

A. Yes, I do.

Q. Do the access tariffs of the LEC Respondents uniformly require calls to be delivered to an end-user premises before access charges can be assessed?

A. Yes.

Q. Does it say any premises, or does the tariff say end-user premises?

A. End-user premises.

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<sup>13</sup> The Respondents' intrastate access tariffs have the identical definition, because most of the Respondents have adopted the ITA Tariff (Exhibit 1 (Owens Direct) at 62, 64), and the ITA Tariff in turn concurs in the NECA Tariff No. 5. *Id.* at 65, 68 See Exhibit 36 (ITA Tariff) at p.3 § 1.1.

Q. And so this defines a premises. If you put the words it has to be an end-user premises in front, what does that connote?

A. *A premise that is uniquely occupied by the end user.*

Q. And so in your opinion, what does it take to be an end-user premises?

A. *The end user needs to occupy the space and have some ownership or control over that space, which can be exhibited by, for example, a lease.*

Q. Are you alone in your view of this interpretation?

A. No, I'm not.

Q. Can you name other evidence that supports that interpretation?

A. Mr. Zingaretti in his deposition.

Tr. at 864-65 (emphasis added).

None of the FCSCs owned or controlled premises in Iowa, let alone premises in the local exchanges of the LEC Respondents. Indeed, there are circumstances where the FCSCs did not even own the conference bridge or routers attributed to them, and paid no fee to use or lease the equipment. For example, the equipment used by [REDACTED]  
[REDACTED]. Exhibit 49 (One Rate Depo.) at 72 & 192-193; Exhibit 1 (Owens Direct) at 81, 96. Similarly, Aventure purchased several routers and allowed all of their international and credit card calling FCSCs use them without charge. Tr. at 2323-2329; Exhibit 1 (Owens Direct) at 30-31. Calling a piece of equipment in the LECs own central office the "end-user's premises defies all logic.

Therefore, Qwest respectfully requests that the Board find:

- The conference bridges utilized by the FCSCs do not constitute an "end-user premises" under the intrastate access tariffs;
- The FCSCs in question in this lawsuit did not have an end-user premises, as that term is defined in the intrastate access tariffs anywhere in the state of Iowa;
- The Board declares that to become an end-user premises, the FCSCs must either own, lease, or control a "building or building" or defined portions of a "building or buildings," which necessarily requires a lease, or ownership.
- The evidence shows that the FCSCs uniformly never paid for the space utilized by the equipment, the power to run the equipment, and had no control over the space where the conference bridge was located.

**E. Much of the Respondents' FCSC Traffic Did Not Terminate in the Certificated Local Exchange Area For Which Respondents Billed Their Access Charges.**

***1. Under the FCC's "End to End" Analysis, the International and Credit Card FCSC Traffic Does Not Terminate in the LECs' Local Exchange Areas.***

The Respondents also violated their switched access tariffs by billing IXCs terminating switched access fees on international and credit card calls. None of these calls actually terminated in Iowa. Instead, the call would be delivered to a "router" in one of the LECs' central offices, the call would be converted from a traditional voice call to a VOIP call, the caller would input some additional digits, and the calls would then be forwarded to its ultimate destination far from the LEC's exchange, and often to a foreign country. Exhibit 1 (Owens Direct) at 42-43. Aventure, Riceville, Great Lakes, I35, and Superior all had relationships with FCSCs that followed this pattern. *See generally* Exhibit 1301 (Devolites Direct). The FCC has generally used an 'end-to-end' analysis to determine where a call terminates. *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Essentially, the end-to-end framework means that termination occurs in the geographic location of the called party, *i.e.*, the end of the call, and does not depend on the intermediate route or intermediate events that occur in the process of the call going to that called party. *In re Long Distance/USA Inc.*, 10 FCC Rcd. 1634, ¶ 13 (1995) (a call "extends from the inception of a call to its completion, regardless of any intermediate facilities.")

The FCC has reiterated its application of the end-to-end analysis in several contexts, including calling cards. *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd. 4826, ¶ 26 (2005) ("even if there are multiple communications, the Commission has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis"), *petition for review denied, AT&T Co. v. F.C.C.*, 454 F.3d 329, (D.C. Cir. 2006); *Qwest Services Corp. v. F.C.C.*, 509 F.3d 531, 535 (D.C. Cir. 2007) (citing *inter alia*, *AT&T Petition re Enhanced Prepaid Calling Card Services*; vacating FCC's order in part as to other issues); *In re High-Cost Universal Service Support, et al.*, FCC 08-262 n.69 (November 5, 2008) (Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, noting end-to-end analysis applies to ISP-bound traffic, ADSL, VoIP, cable modem service). Calling cards and

international calling scams operate identically; thus, the FCC's analysis is directly on point. Therefore, the end-to-end analysis applies to all of the international and calling card calling at issue in this proceeding. Exhibit 1 (Owens Direct) at 111-112.

The end-to-end analysis also applies to Free Conference's "pre-recorded" playback calling. Pre-recorded playback is where a conference call is recorded and stored on a server in Rudd, Iowa. Exhibit 132 (Free Conferencing/Erickson Depo.) at 190-191 (recording servers were located in Rudd, Iowa). Conference calls were then scheduled to listen to a pre-recorded conference. *Id.* at 324-328. The conference bridge would collect the listeners, and then reach out to the recording server in Rudd, Iowa and connect the listeners to that server. The end-to-end analysis thus means that such Free Conference calls actually did not end in the terminating exchange, but were terminated in Rudd, Iowa.

International, credit card and pre-recorded playback calls are indisputably not terminated at the Respondent's local exchanges, but are simply routed through equipment located in Respondents' exchanges, to destinations outside of Iowa. Exhibit 1 (Owens Direct) at 113. Therefore, the Respondents' switched access charges on international and credit card calls are contrary to their switched access tariffs, not only because of the lack of a customer and customer premises, but also because these calls are just forwarded to other destinations. The Board should therefore find that all international, credit card and pre-recorded playback calls are not terminated at the Respondent's local exchanges.

***2. Riceville Billed For Traffic That Actually Went to Farmers Mutual Telephone Company, in Rudd, Iowa.***

At hearing, Ron Laudner, General Manager of Riceville, admitted that virtually none of the traffic associated with its FCSC partners terminated in any exchange where Riceville was a certificated local exchange carrier. Riceville uses a remote switches that are connected to a host switch, which is located in the Rudd exchange and is operated by a different company, Farmers Mutual Telephone Company. Farmers Mutual is certificated to provide local exchange services in Rudd, and Riceville is not. Tr. at 1869-1870.

Riceville's first FCSC partner was Free Conference. Tr. at 1881. Free Conference sent one bridge, and that first bridge was located in the Riceville exchange, where Riceville is certificated. Tr. at 1882. However, the transport facility between the host switch and the remote switch had limited capacity, and the conference bridge was overloading it. Tr. at 1882. As a result, Riceville moved the conference bridge into a switching center located in the Rudd exchange, where it is not a certificated carrier. Tr. at 1882-83. Then as Riceville's relationships grew with Free Conference and as Riceville partnered with additional FCSCs, all of the FCSC equipment was placed at no charge in a switching center in Rudd. *Id.* at 1883-84. Thus, with the exception of the first Free Conference bridge for a brief period of time, none of the FCSC traffic was ever transported into, or terminated in the Riceville local exchange area:

Q. And so the services you were providing to Free Conference and Audiocom and Hometown and the others was not being provided within the four corners of the Riceville exchange, was it?

A. No.

Q. That meaning that's correct?

A. That's correct.

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Q. ... And all of the switched access rates that Riceville charges, and it was about six cents a minute, and I know I'm rounding, but about that at the time, correct, for intrastate traffic?

A. About 5.4.

Q. 5.4. Thank you. All of those rates are premised on calls going through the host all the way to the remote, correct?

A. Correct.

Q. Transport is based on going to Rudd and being transported to Riceville, correct?

A. Correct.

Q. And none of those services were being provided, were they... [for] Free Conference, for Audiocom [etc.]

A. No, they weren't.

Q. No, they weren't. But they were being charged as if they were?

A. Yes.

Tr. at 1884-1885. Thus, Mr. Laudner admits that none of the traffic was terminated in the Riceville exchange or any other exchange where Riceville was certificated to provide local service. Mr. Laudner also admitted that, as a result, Riceville was not providing local exchange services pursuant to tariff to its FCSC partners. Tr. at 1869-1870, 1885-1890. As stated above, a requirement to charge switched access is that the person receiving such calls must be an end-user who is obtaining local exchange services under tariff, and Mr. Laudner admits Riceville's FCSCs do not meet this criteria.

To compound the problem, the calls were actually being terminated (or at least routed through) the Rudd exchange. Mr. Laudner (who is also the General Manager of Farmers Mutual) knew that if Rudd took over the relationships with the FCSCs, Rudd would have to send the switched access revenue into the NECA pool, and it would not be the recipient of payments for the millions of dollars in switched access. Tr. at 1874-1875, 1878-1884, 1916-1918. As a result, Riceville maintained the fictional relationship, knowing it was a fraud. Here, it is impossible to cure the situation because Mr. Laudner admits that Farmer's Mutual did not have an end user relationship with the FCSCs. Tr. at 1870-71. Thus, Mutual cannot charge switched access for that reason, and Riceville cannot charge switched access because it did not provide service over a common line in a certificated exchange, did not provide local exchange service pursuant to tariff, and the service provided was outside of a certificated exchange. Therefore, the Board should find that:

- Riceville did not provide local exchange service to any FCSC;
- Riceville was knowingly operating a service outside of its certificated exchange;
- Riceville did not have an end-user relationship with any FCSC;
- Riceville did not deliver any FCSC traffic to an end-user premises; and,
- Riceville did not terminate any of the traffic destined to numbers assigned to their FCSC partners.

**3. *All of the Superior Traffic Was Laundered: the Calls Actually Went to Great Lakes, Not Superior.***

Likewise, Superior never had any of its traffic terminate in its exchange. Superior opted out of the NECA pool, set a 13.6 cent per minute access rate, and created a business relationship with a company called Clear Link. [REDACTED]

[REDACTED] Clear Link (i.e., Great Lakes) then placed the [REDACTED]  
[REDACTED]. Superior claimed to have an oral agreement for the use of the space and switching in the Great Lakes central office, but no documentation of any kind supports the purported deal.

Great Lakes then switched and controlled the traffic, and Superior paid Great Lakes nothing for its efforts. However, instead of using Great Lakes' 5 cents per minute rate, Superior's 13.6 cent per minute rate was applied to the invoices. This is true even though Superior admits that 100% of the traffic never even touched the Superior exchange, the only place where it is certificated to provide service. Given that they did not provide service of any kind, let alone service in a certificated exchange, Superior has no basis to charge switched access at all.

Superior understands the problem and therefore hired an expert to state (a) Superior was providing the FCSCs with local service; and (b) the service was foreign exchange service. By the end of cross examination, however, the expert had effectively conceded that neither exists.

Superior's expert tried to argue that the contract between Superior and Clear Link created an end-user relationship between Superior and the FCSCs. Exhibit 1080. Any fair reading of the contract shows otherwise. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED].] Tr. at 2567-2569.

Even if FCSCs could otherwise qualify as end users of local exchange service, neither Superior nor Great Lakes had a *direct* relationship with the FCSCs – Clear Link did. Under the Board’s analysis in *360Networks*, neither Superior nor Great Lakes was entitled to access charges without having a *direct* retail end user. *360Networks*, 2006 WL 2558996.

Superior’s second argument – that Great Lakes was providing a foreign exchange (“FX”) service – is completely baseless. Tom Mart, Superior’s Board Member, admitted that there were no facilities between Superior and Great Lakes, which defeats the FX argument. Tr. at 2723-24; *see also* Tr. at 2611-12 (Superior’s expert admits the same). Superior’s expert admitted that the service failed to comply with Superior’s local tariff in every significant respect. The service did not meet the rates, terms or conditions of foreign exchange as defined in Superior’s local exchange tariff. Tr. at 2611-2621 & Exhibit 1389.

Finally, it is legally impossible for the FCSCs to be Superior’s customers. Superior is a cooperative governed by Iowa Code 499.1. Cooperatives can limit their business to members:

Any association may restrict the amount of business done with nonmembers and may limit its dealings or any class thereof to members only.

Iowa Code § 499.3. Superior admitted that it was authorized to do business only with “members.” Exhibit 1386. There is no evidence in the record to support that any FSCS are members of Superior. Superior admitted that members must pay a fee (Exhibit 1387), and neither the FCSCs nor Clear Link paid such a fee. Tr. at 2711-2713. Thus, as a matter of law, the FCSCs cannot be Superior’s end users. Yet, revenue from Clear Link generated more than 50% of Superior’s income. Tr. at 2714.

In the end, Superior’s expert stated not once, but on three separate occasions, that he was “curious” about whether Great Lakes, Clear Link and Superior had entered into a relationship and tried to create an after the fact rationalization to justify millions of dollars in unjustified switched access charges. Tr. at 2562-2563, 2592-2593, 2596-2597. The relationship between Superior, Great Lakes and Clear

Link was a sham from the onset. The Board should find that Superior and Great Lakes violated their certificates of authority for operating a sham entity, as the Board has contemplated in past decisions *360Networks*, 2006 WL 2558996.

***4. All of the Reasnor Traffic Was Laundered: the Calls Actually Went to Sully Telephone Association, Not Reasnor.***

The genesis of Reasnor Telephone Company shows the lengths to which a company will go when there are millions of dollars to be illegally generated from traffic pumping. [REDACTED]

[REDACTED].] See Exhibit 1 (Owens Direct) at 213-240, 304-313.

Even after the sale, Sully continued to operate the Reasnor exchange.

Exhibit 1 (Owens Direct) at 60-61. The Iowa Board is entitled to draw all reasonable inferences from the facts, and to weigh credibility. *Arndt*, 728 N.W.2d at 394-395 (discussing standard of

review under Iowa APA, “[i]t is the commissioner’s duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue”). [REDACTED]

[REDACTED].] Given all of these facts, the only reasonable inference is that the Reasnor sale was a sham transaction with the sole purpose of maintaining an illicit revenue stream.

In an attempt to overcome these problems and to claim it is entitled to collect access charges on calls that do not terminate in the Reasnor exchange, [REDACTED]

[REDACTED] Moreover, the service provided to [REDACTED] does not even meet the definition of foreign exchange in the tariff. Exhibit 1364, Sully Telephone Association Telephone Tariff, Part V, Sheet 6, Foreign Exchange Service, ¶D.3. The tariff language required both Sully and Reasnor to issue [REDACTED]

[REDACTED]. *Id.* But Sully did not bill [REDACTED] at all. The failure of Sully to treat [REDACTED] in accordance with its local exchange tariff during this period – a requirement for foreign exchange service – totally undermines its argument that it was providing foreign exchange service.

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<sup>14</sup> Moreover, it is impossible for One Rate to be a Reasnor end-user for many reasons. In addition to others set forth in this brief, [REDACTED] Exhibit 49 (One Rate Depo.) at 19, 41-42, 55 and 122-123. This relationship plainly does not qualify as having a direct end user relationship, as required for access charges. *360 Networks*, 2006 WL 2558996.

Moreover, the facts show that the claimed “foreign exchange service” never existed. From the onset of the Sully/One Rate relationship, [REDACTED]

[REDACTED]. There is not one document with the words foreign exchange service on it. All the documentary evidence shows the opposite.

Indeed, the documents that exist show Reasnor never considered the facility to be a foreign exchange service. Gary Neill submitted an affidavit, which shows that foreign exchange service was never contemplated:

All of the conference calls placed to One Rate’s conference call platform in the Reasnor exchange terminate in Reasnor. Reasnor Telephone does not route any calls dialed into One Rate’s conference call platform to locations outside of the Reasnor exchange.

(Affidavit of Gary Neill, March 9, 2007) Exhibit A to Reasnor Motion for Summary Judgment (filed March 12, 2007) ¶6. Thus, at the outset of this proceeding Mr. Neill avowed that the bridges used by One Rate were in the Reasnor exchange, and calls associated with those bridges never left the Reasnor exchange. Of course, this is a pure fabrication, as now everyone admits that the bridges were always in the Sully exchange, and none of the calls associated with One Rate were terminated in the Reasnor exchange.

[REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED].] Exhibit 1245  
(Sully/Zingaretti Depo., September 18, 2007) at 40-41. As a result of all the documentary evidence, and the numerous self-contradictions, it is abundantly clear that the purported FX lines were a sham; an after the fact created fiction.

These facts lead one squarely back to traffic laundering. This situation is no different than that of Riceville or Superior. Like the others, Reasnor is attempting to charge terminating switched access for the termination of calls in the Sully exchange, an exchange where is is not certificated to provide service. Reasnor's tariff only allows it to provide local exchange services in the Reasnor exchange. 199 IAC §§ 22.1(5), 22.20(1); Exhibit 44 (Reasnor tariff). The only difference between Superior, Riceville and Reasnor, is that Reasnor tried to disguise its involvement, and as a result, its cover-up is filled with misrepresentations and deceit. These fictions are an attempt to justify illegal invoices exceeding \$10 million. The Board should see through this scam, and find that Reasnor's cover-up is part of an active scheme to defraud.

**F. Respondents Great Lakes and Superior's Switched Access Charges Are For Traffic Outside of Their Certificated Exchange Areas.**

***1. Respondent Great Lakes Is Not Certificated for the Local Exchange Area Where Great Lakes Located its FCSC Partners' Conference Bridges.***

A further ground for finding Great Lakes' access charges in this case violate its switched access tariffs is that Great Lakes is not certificated to provide service in Spencer, Iowa, the local exchange area where it located the FCSCs' equipment. Tr. at 2410-2411, 2417, 2419-2420, 2461-2462. The Board issued an order that authorized Great Lakes to provide service in the Lake Park exchange. Exhibits 1384-1385. Thereafter, Great Lakes obtained authority to add the Milford exchange. Exhibit 723. Great Lakes argues that it attempted to obtain greater authority; however, Great Lakes' own local exchange tariffs specifically state that Great Lakes only offers services in the Lake Park and Milford exchanges. Exhibit 47 at § A(1)(b); Tr. at 2623.

Great Lakes' tariff does not state that Great Lakes provides services in Spencer; moreover, Great Lakes certificate does not authorize service in Spencer. Tr. at 2625-26. Given that 100% of the services Great Lakes is providing is outside of the certificated exchange, even [REDACTED]  
[REDACTED]  
[REDACTED]. *Id.*

Providing service outside of the LEC's certificated exchange areas is contrary to the Board's rules: the Board only certifies LECs for operation in particular exchange areas.

22.1(5) *Basic utility obligations.* Each telephone utility shall provide telephone service to the public ***in its service area*** in accordance with its rules and tariffs on file with the board. Such service shall normally meet or exceed the standards set forth in these rules governing "Rates Charged and Service Supplied By Telephone Utilities."

199 IAC 22.1(5) (emphasis added). Rule 22.1(5) is clear: an Iowa LEC is to provide service in its certificated service territory. The Board's rules also further define service territories for Iowa LECs (other than for resale):

***Service territories are defined by the telephone exchange area boundary maps*** on file with the Iowa utilities board. The maps will be available for viewing at the board's office during regular business hours and copies are available at the cost of reproduction. This rule does not apply to resale of local telephone service pursuant to rule 22.17(476).

22.20(1) *Issuance of certificates of authority to utilities on or prior to September 30, 1992.* The initial nonexclusive certificate of authority will be issued by the board on or before September 30, 1992, to each land-line telephone utility providing local telecommunications service in Iowa. ***The certificate will authorize service within the territory as shown*** by boundary maps in effect on January 1, 1992, but will reference and include modifications approved by the board prior to the issuance of the certificate. ***The certificate will be in the form of an order issued by the board and may be modified only by subsequent board orders.***

22.20(4) *Subsequent certificates.* Any legal entity which desires to serve all or a portion of a territory which is currently assigned to another land-line utility may petition for a new certificate or a certificate modification depending upon whether the utility already has a certificate to serve. After notice to affected utilities and opportunity for hearing, the board will determine whether the new certificate or certificate modification will promote the public convenience and necessity. If the new or modified certificate is granted, the result may be two or more utilities serving all or a portion of an assigned territory.

199 IAC 22.20(1), (4) (emphasis added). Rule 22.20 requires that if Iowa LECs wish to provide service in exchange areas outside of their certificate, they must petition the Board for permission to do so by a new or modified certificate.<sup>15</sup>

Great Lakes argued that its purported attempt to obtain a certificate to provide service in the Spencer exchange excused its billing for switched access charges in an area not covered by its tariffs. During the hearing, Board Member Tanner described the Board's rules, that the LEC's tariff must state the exchange areas:

BOARD MEMBER TANNER: ... Frankly, all of this means something to the IUB. We know our own process. Sometime in 2004 the Board began issuing certificates just like this one that says it's authorized to provide local service in the exchanges shown by its tariff so we didn't have to continually amend the certificate, but it is certificated for those listed in the tariffs, so to the extent that they have something on file, and that's exactly what Mr. Hanrahan is saying, that you have to add Milford, so what this tells us is *the certificate is whatever the tariff is*. It's not what this sheet says or this e-mail says. Mr. Dublinske is correct, that the documents and the certificate and the tariffs speak for themselves, but that doesn't mean they're not entitled to enter this e-mail for whatever it is worth.

So it is just that that's the context, and I only gave that long explanation so that everyone is clear about IUB rules, and that's how we interpret it, and that's how we'll be interpreting these documents.

Tr. at 2495-96 (emphasis added). See also Tr. at 2629.

Thus, it is undisputed that: (1) tariffs and certifications define where a LEC in Iowa has authority to operate; (2) Great Lakes can only provide local exchange services in exchanges where it is certificated; (3) Great Lakes is not certificated in Spencer; and (4) 100% of Great Lakes services are provided in Spencer. As stated above, LECs like Great Lakes must deliver a call to an end-user under their local exchange tariffs as a pre-condition to charging switched access. Given that none of Great Lakes FCSC partners could possibly be end-users of the local exchange tariff (because they are not certificated in Spencer), none of Great Lakes switched access invoices are justified or proper. Even Great Lakes' expert is troubled by Great Lakes conduct..

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<sup>15</sup> The federal law also recognizes the Board's authority to define local exchange areas. "The FCC's initial implementing regulations of the Act also left with the state commissions the power to define local calling areas consistent with their historical practice of defining local service areas for wireline LECs." *Qwest Corp. v. Washington State Utilities and Transp. Comm'n*, 484 F. Supp. 2d 1160, 1163 (W.D. Wash. 2007) (internal quotation marks omitted).

Moreover, the Board issues certificates of authority to offer local telecommunications services so that LECs can offer services to Iowa residents. Great Lakes has no outside plant. Tr. at 2422. Great Lakes never served a single Iowa resident with phone service, and has expressed no intention of ever serving any Iowa residents. Great Lakes' entire business plan is to serve FCSCs. Tr. at 2422-2423. There is no public interest or public benefit to such a business plan. "Each local exchange utility has an obligation to serve all eligible customers within the utility's service territory, unless explicitly excepted from this requirement by the board." Iowa Code § 476.29(5). Qwest therefore requests that the Board exercise its inherent authority over the certificates of local exchange carriers in Iowa and revoke Great Lakes' certificate of authority to provide service anywhere in the state of Iowa. Iowa Code § 476.29(9) ("A certificate may, after notice and opportunity for hearing, be revoked by the board for failure of a utility to furnish reasonably adequate telephone service and facilities.")

***2. Even if Superior Had Provided Service to the FCSCs, Superior Is Not Certificated in the Spencer Exchange, Where Great Lakes Placed the FCSC Equipment, and Superior's Articles of Incorporation and Status as a Cooperative Preclude it From Offering Service in Spencer.***

As stated above, Superior claims to be providing service to FCSCs out of the Spencer exchange. All of the facts and evidence show this assertion is a complete fabrication. However, even if Superior were providing service to FCSCs in the Spencer exchange, its lack of certification shows Superior cannot be providing local exchange service in that exchange for the same reasons explained for Great Lakes. Moreover, Superior's Articles of Incorporation only authorize operations in Superior, its designated exchange. Mr. Mart admitted as much on the stand. Exhibit 1387; Tr. at 2605-2606.

**G. Respondents' Services to FCSCs Also Fail to Meet the Switched Access Requirement of Common Carriage; Instead, the LECs are Offering Private Carriage to Their FCSC Partners.**

The LECs' are not entitled to switched access charges on their FCSC traffic unless the LECs are providing common carriage, i.e., are acting as common carriers in providing services to the FCSCs. Common carriage is when a carrier "indiscriminately offer[ed] its services to a class of users so as to be effectively available to the public." *Iowa Telecommunications*, 545 F. Supp. 2d at 875. Specifically, the

law requires the LECs must be “telecommunications carriers” within the meaning of the Communications Act:

A “telecommunications carrier” is “any provider of telecommunications services.” 47 U.S.C. § 153(44). “Telecommunications service” is defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be directly to the public, regardless of the facilities used.” *Id.* at § 153(46). To determine whether a provider is offering services “directly to the public,” the Federal Communications Commission (“FCC”) and various courts have applied a “common carrier” test. *See In re AT & T Submarine Sys., Inc.*, 11 FCC Red. 14885 (1996); *Iowa v. FCC*, 218 F.3d 756, 758 (D.C.Cir.2000); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C.Cir.1999) .... Under this test, a provider cannot be a telecommunications carrier unless it is a common carrier. *Iowa*, 218 F.3d at 758. ***The test for common carriage is two-fold: the carrier must (1) hold itself out indiscriminately or indifferently to the clientele it serves; Nat’l Ass’n of Regulatory Util. Comm’r v. FCC*, 525 F.2d 630, 641 (D.C.Cir.1976)...; and (2) have a system that allows “customers [to] ‘transmit intelligence of their own design and choosing.’ “ Nat’l Ass’n of Regulatory Util. Comm’r v. FCC**, 533 F.2d 601, 609 (D.C.Cir.1976) ...(quoting *Indus. Radiolocation Serv.*, 5 F.C.C.2d 197, 202 (1966)).

*Iowa Telecommunications*, 545 F. Supp. 2d at 876 (emphasis added). “[A] carrier offering its services only to [a] legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class.” *Id.* at 878. In addition, providing services for free by definition is not common carriage. 47 U.S.C. §153(44) (telecommunications carrier provides service “for a fee”); *In re pulver.com’s Free World Dialup*, 19 FCC Red 3307, 3312-13 ¶ 10 (Rel’d Feb. 19, 2004) (“In addition, as its name suggests, [Free World Dialup] is free of charge to users and, in order to be a telecommunications service, the service provider must assess a fee for its service.”); *Northern Pacific Railway Co. v. Adams*, 192 U.S. 440, 453 (1904). *See also Francis v. Southern Pacific Co.*, 333 U.S. 445, 448 n.2 (1948); *Thompson v. AMTRAK*, 621 F.2d 814, 820, 823 (6<sup>th</sup> Cir. 1980), *rehearing denied*, 1980 U.S. App. LEXIS 15715 (6<sup>th</sup> Cir.), *cert. denied*, 449 U.S. 1035 (1980).

In this case, the Respondents do not hold themselves out “indiscriminately or indifferently” to “a legally defined class of users.” Rather, Respondents are (1) providing their FCSC services to an illegally defined class of users (FCSCs), (2) on terms that require the payment of kickbacks, which payments vary by FCSC without corresponding differences in the services provided to the FCSCs, (3) only providing these services to the FCSCs with whom they choose to contract, instead of offering the services to all

FCSCs or bona fide customers; (4) keeping their FCSC contracts confidential, i.e., not available to the public, despite the requirement that local exchange services must be provided pursuant to filed tariff; (5) providing services to FCSCs free of charge; and (6) not offering such services to any actual end users. *See supra*. Indeed, some of the contracts between LECs and FCSCs have exclusivity provisions that bar the LEC from entering into a similar deal with another FCSC. *See, e.g.*, Exhibit 1008 at § 3. Thus, the Respondents utterly fail to meet the common carriage requirement of switched access. The LECs are providing their FCSC partners with private carriage, which by definition, is not subject to access charges.

**H. The FCC's Orders in *Merchants* (Under Reconsideration) and *Jefferson* Are Fully Consistent With Finding That Traffic Pumping Violates The Respondents' Tariffs.**

In the face of the overwhelming facts against them, Respondents turn to inapposite FCC cases in the hope of avoiding a decision on the merits by the Board. The cases on which Respondents primarily focus are the FCC's decision (under reconsideration) in Qwest's complaint against Merchants (*In re Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, 22 FCC Rcd 17973, FCC 07-175, File No. EB-07-MD-001, (rel. Oct. 2, 2007), partial reconsideration and further proceeding granted, 23 FCC Rcd 1615, FCC 08-29 (January 29, 2008)), and *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001). Neither of these cases (nor any other) offer any benefit to the LECs. Instead, the FCC and federal court decisions each either address different facts or claims, or actually support Qwest's claims and the relief that Qwest seeks from the Board.

***1. The Board Should Completely Ignore the FCC's Decision in *Qwest v. Merchants*, as that Decision is Under Reconsideration because Merchants Falsified Documents.***

The LEC Respondents first argue that the FCC's October 2, 2007 Order is binding on the Iowa Board and that the decision found FCSCs are customers regardless of whether they pay for LECs' tariffed services or not. Both of these contentions are flatly incorrect. Issue preclusion requires several elements, one of which is the decision must be final. *Global Naps, Inc. v. Massachusetts Dept. of*

*Telecommunications and Energy*, 427 F.3d 34, 44 (1<sup>st</sup> Cir. 2005).<sup>16</sup> The specific test for issue preclusion is as follows:

We follow a well-established analytical framework in deciding whether a party is precluded from re-litigating an issue. The prerequisites for preclusion are: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

*Larson Mfg. Co., Inc. v. Thorson*, \_\_\_ N.W.2d \_\_\_, 2009 WL 349578, \*5 (Iowa, Feb. 13, 2009). Here, the LECs cannot meet either the finality requirement or the same issues requirement.

*a. On Reconsideration, the FCC Specifically Stated that Its Original Decision was Not Final.*

***While the FCC is reconsidering in its further proceedings, the October 2007 order does not have the requisite finality for issue preclusion.*** The FCC noted in its January 2008 order that it was granting in part reconsideration and instituting further proceedings, pursuant to 47 C.F.R. § 1.106. FCC 08-29 at ¶12. This regulation expressly states that when the FCC opens further proceedings to reconsider an order, “a ruling on the merits” is deferred:

If the Commission or designated authority initiates further proceedings, ***a ruling on the merits of the matter will be deferred pending completion of such proceedings.*** Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings, including rehearing, as may be appropriate.

47 C.F.R. § 1.106(k)(2) (emphasis added). Accordingly, by issuing the January 2008 order, the FCC removed the finality of the October 2, 2007 order at least as to the issues that are under consideration in the further proceedings. *See also Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d

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<sup>16</sup> Moreover, it is highly unclear that issue preclusion could even apply to an FCC order in this proceeding. “Preclusion is much less likely to attach when a proceeding in one agency is followed by a proceeding in another agency.... When the agencies are creatures of different governments, all of the principles that generally prevent one government from precluding another are at work.” 18B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4475, at 474-75 (2d ed. 2002); *see also Global Naps, Inc. v. Massachusetts Dept. of Telecommunications and Energy*, 427 F.3d 34, 46 (1<sup>st</sup> Cir. 2005) (refused to apply issue preclusion because “[t]he model ... is to divide authority among the FCC and the state commissions in an unusual regime of ‘cooperative federalism’....”).

539, 549 -550 (D. Md. 2002) (no preclusive effect in commission's first order finding parties' intent in interconnection agreement, because the commission entered a second order that reconsidered the issue) (citing *McGowen v. Harris*, 666 F.2d 60, 65 (4th Cir. 1981)). Cf., *Alabama Mun. Distributors Group v. FERC*, 312 F.3d 470, 474 (D.C. Cir. 2002) (administrative decisions that are not appealable have no preclusive effect for future litigation). The FCC has indeed recognized that the Merchants decision is not final or precedential as long as it remains under reconsideration. After expressly rejecting InterCall's argument that *Merchants* had found conference call providers to be end users, the FCC added:

Moreover, as Verizon notes, the holding in the *Qwest v. Farmers Order* is subject to reconsideration on the factual issue of whether the conference calling companies were end users under Farmer's tariffs. We, therefore, conclude that the prior precedent cited by InterCall does not support a finding that InterCall is an end user for purposes of direct USF contribution obligations.

*InterCall Decision* at ¶21 (note omitted).

Furthermore, as the Board saw first hand with the cross-examination of Mr. McGuire, Merchants obtained the decision through the manufacture and falsification of evidence. It is for this very reason that the FCC is reconsidering its decision. The FCC specifically stated that the reason it had found the FCSCs to be Merchants' customers was because of Merchants' false representations that they had billed the FCSCs, and the FCSCs had paid for service:

When we ruled on whether Farmers properly charged Qwest terminating access for calls to the conference calling companies, ***a key issue was whether those companies were "end users."*** That question, in turn, depended on whether the companies were customers that "subscribe[d] to the services offered under [Farmers'] tariff." ***We found that the conference calling companies did subscribe to services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge.*** Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated. In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question. According to Qwest, this backdating indicates that the conference calling companies were *not* Farmers' customers during the relevant time period, but rather were its business partners.

FCC January 29, 2008 Order on Reconsideration at ¶7 (emphasis added). See also *InterCall Decision* at ¶21 ("[T]he Commission was assuming certain facts in the case as the parties presented them.

Specifically, the Commission's statement that conference calling companies are end users was premised on Farmer's assertion that this was how they were defined in Farmer's tariff," footnote omitted).

In this context of fraud committed in the *Merchants* case, issue preclusion cannot apply. Such facts ("fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party") support vacating a final judgment under Federal Rule of Civil Procedure 60(b). "Where the record is patently inadequate to support the findings the ALJ made, application of res judicata is tantamount to a denial of due process. Fairness in the administrative process is more important than finality of administrative judgments." *Thompson v. Schweiker*, 665 F.2d 936, 940-941 (9<sup>th</sup> Cir. 1982). *See also* Restatement 2<sup>nd</sup> of Judgments § 28(5)(c) (exception to issue preclusion where "the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.").

*b. The Issues for Decision Before the Board Are Different Than the Issues Before the FCC; Moreover, the Board has a Complete Factual Record.*

Another requirement of issue preclusion is that the issues for decision are identical. The Board is uniquely qualified to determine the issues in this case, such as whether the FCSCs are end users of the LECs' local exchange tariffs. The FCC's October 2007 order does not in fact even attempt to decide state law issues. Nor did the FCC decide the same issues that are before the Board. The FCC did not have before it the facts that Qwest has shown in this case regarding the Respondents' total lack of expectation for payment of local exchange service charges from the FCSCs. The FCC also did not decide whether the calls were delivered to an end user's premises. The FCC did not decide the question of discrimination in local exchange services nor whether the public interest in Iowa requires that certificated LECs be prohibited from pumping traffic. The Board found these reasons sufficiently compelling to deny a stay request in October 2007. Order of October 22, 2007 at 4. *See, e.g., SBC Communications Inc. v. F.C.C.*, 407 F.3d 1223, 1229 (D.C. Cir. 2005) (FCC's decision regarding SBC's general obligation to provide

shared transport had no issue preclusive effect in subsequent action regarding two particular CLECs who had waived their right to the service).<sup>17</sup>

Accordingly, every court that has heard Respondents' arguments concerning the October 2007 decision has rejected those arguments. For instance, Judge Piersol of the District of South Dakota recently held:

[T]his Court is not convinced that FCC's October 2, 2007 decision in *Farmers & Merchants* is at this time properly characterized as settled precedent. Although more than five months have passed since Qwest submitted its amended petition, this Court believes it is as likely that the passage of time indicates that the FCC is in some way modifying its *Farmers and Merchants* decision as it is that the FCC has determined that the decision will remain unmodified without having issued an order stating the same.

*Sancom, Inc. v. Sprint Communications*, 2009 WL \_\_\_\_\_, Civ. No. 07-4107-LLP (D.S.D. March 24, 2009) (footnote omitted).<sup>18</sup> See also *Aventure Communications Technology, L.L.C. v. MCI Communications Services, Inc.* 2008 WL 4280371, 2 (N.D. Iowa 2008) (Magistrate Judge Walters) ("The Court has deferred supplemental briefing on pending motions to dismiss in three similar cases until the FCC has issued a final decision in *Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co.* which is under reconsideration."); *Sancom, Inc. v. Qwest Communications Corp.*, 2008 U.S. Dist. LEXIS 49491 at \*15 n.1 (D.S.D. June 26, 2008) and *Northern Valley Communications L.L.C. v. MCI Communications Services, Inc.*, 2008 U.S. Dist. LEXIS 49484 at \*12 n.1 (D.S.D. June 26, 2008) (each case noting the FCC's pending reconsideration; distinguished the facts and claims in *Merchants*). The enormous amount of time that Respondents spent with witness after witness on the October 2007 decision was for naught. As everyone who has considered the issue has recognized, the decision currently has no weight whatsoever.

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<sup>17</sup> Moreover, Messrs. Owens (Tr. at 579-583, 586-589, 648-650, 840-845) and Appleby (Tr. at 1807-1814) explained in detail why the FCC should have no preclusive effect.

<sup>18</sup> The *Sancom v. Sprint* opinion cites a decision from the Southern District of New York, *All American Tel. Co., Inc. v. AT&T, Inc.*, 2008 WL 2876424 (S.D.N.Y. July 24, 2008), in which the court dismissed AT&T's counterclaims; very recently, the court vacated that decision. 2009 WL 691325 (S.D.N.Y. March 16, 2009).

The Board has the complete record before it. None of the LEC Respondents ever billed the mandatory charges to the FCSCs; none of the LECs ever leased any space in the central offices to the FCSCs; none of the FCSCs have ever paid for any local exchange services. It is irresponsible and contrary to the law to ask the Board to rely upon a decision that is premised upon factual misrepresentations.

**2. *The LECs' Reliance Upon Jefferson is Similarly Misplaced.***

Respondents' reliance on the *Jefferson* opinion (*AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001)) is likewise misplaced. During cross examination, Mr. Robert Holz tried to suggest that the LECs relied upon *Jefferson* before entering into their traffic pumping scheme. There is no evidence to that effect. Indeed, not one of the LECs so testified. The FCC in fact has already rejected any such reading or reliance on *Jefferson*, when it rejected InterCall's argument that the case had determined conference call providers are end users of LECs tariffs. *InterCall Decision* at ¶21. *See also, Merchants* October 2007 decision, ¶34 n.115.

*Jefferson* involved claims not at issue here, and presumed facts (*e.g.*, termination) which Qwest has shown to be otherwise in this case. It is important to note that the FCC could not decide anything in *Jefferson* that was not pled with specificity. 47 C.F.R. § 1.720(a) ("Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense or requested remedy, including damages, should be pleaded fully and with specificity."); 47 C.F.R. § 1.721(a)(5) (a "formal complaint shall contain," *inter alia*, "a complete statement of facts which, if proven true, would constitute such a violation."). *See also AT&T Corp. v. FCC*, 317 F.3d 227, 237 (D.C. Cir. 2003) (distinguishing complaint filed with FCC and one filed in court). Thus, the only issues decided were those specifically identified with particularity.

The only claim that AT&T brought in *Jefferson* was that Jefferson (an ILEC) violated Sections 201(b) and 202(a) of the Communications Act because it shared interstate terminating access revenues with a chat line provider. *Jefferson*, 16 FCC Rcd. 16130 at ¶¶3-5. Specifically, AT&T claimed that the revenue sharing "violated the 'indifference' requirement of common carriage. . . ." *Jefferson* at ¶¶9-10. A carrier meets the indifference requirement "[a]s long as a carrier provides service indifferently and

indiscriminately to all who request it. . . .” *Id.* at ¶10. The “record contains no evidence that Jefferson ever made any individualized decisions in specific cases concerning whether and on what terms to provide interstate access services.” *Id.* at ¶11. The FCC emphasized the narrowness of AT&T’s allegations a second time – “AT&T fails to allege that Jefferson treated one customer differently from another.” *Id.* at ¶15. Here, Qwest proves that very point in its discrimination claim.

Indeed, the FCC recognizes that facts presumed in earlier decisions are not precedential when later cases call the same facts into question. *InterCall Decision* at ¶21. This case brings several claims not considered in *Jefferson*, and shows that many of the facts that were presumed to be true in that case indeed are not true. *For example, in Jefferson, the FCC presumed that the local carrier terminated the calls. Id.* at ¶4. Here, Qwest has specifically shown that the LEC Respondents do not terminate the calls. Jeff Owens also testified as to several fact issues that were presumed or not addressed in *Jefferson*, which Qwest has shown in this case to be contrary to the *Jefferson* presumptions:

Q. Did the Jefferson decision ever address whether the free calling parties were end users?

A. No.

Q. Did they address whether the calls were being delivered to an end-user premises?

A. No.

Q. Did it address the issue of discrimination between end users?

A. No.

Q. Did it address situations where traffic is not being delivered to the LECs local calling area?

A. No.

Q. Did it address calls flowing through local exchange areas and going to distant lands?

A. No.

Q. Did it address issues where carriers failed to bill the FCSCs for any local exchange services?

A. No.

Q. Did it address back-billing or manufacture of evidence?

A. No.

Q. Did it address many of the other issues we have in this proceeding?

A. I don’t believe so.

Tr. at 844-845.

Finally, the FCC expressly limited *Jefferson* to the specific facts alleged and noted it did not reach any other statutes or regulations, beyond the “indifference” claims AT&T had stated under Sections 201(b) and 202(a) of the Communications Act:

Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. *We find simply that, based on the specific facts and arguments presented here*, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. *We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end-user customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.*

*Jefferson* at ¶16 (emphasis added). In sum, *Jefferson* has no applicability to this case.

The FCC's other traffic pumping decisions are consistent with the findings that the Board should make here. Even without an allegation of discrimination in the provision of local exchange services, the FCC found that creating an entity "designed solely to extract inflated access charges from IXC's . . . is an unreasonable practice in connection with the provision of access service violation of section 201(b) of the [Communications] Act." *In re Total Telecommunications Services, Inc. et al. v. AT&T Corp.*, 166 FCC Rcd 5726 at ¶16 (2001), *aff'd in relevant part, AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003). Qwest has shown this exact allegation is true of Great Lakes and Adventure, at a minimum. *See also, In re AT&T Corp. v. Beehive Telephone Company, Inc., et al*, 17 FCC Rcd 11641 (2002) (charging for services not set forth in tariff violates Section 203 of Act; Beehive's revenue sharing violated Section 201(b) of the Act by generating excessive returns).

**I. Because of The Tariff Violations, The Board Should Order Refunds For the Full Amount of Intrastate Access Fees on Respondents' FCSC Traffic.**

Because the Respondents did not provide terminating switched access services on the FCSC traffic, the Board should enter an order finding that Qwest is not liable to any of the Respondents for any switched access fees on the Respondents' FCSC traffic from July 1, 2005 forward. This conclusion – that Respondents had and have no basis on which to seek payment from Qwest for FCSC traffic – follows directly from the fact that *Respondents have no filed tariff to support any charges for the services they actually performed in delivering calls to the FCSCs' equipment*. Section 476.5 provides that LECs can only charge for the services prescribed by tariff:

No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public

utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage.

Iowa Code § 476.5 (in part). *See also* Iowa Code § 476.3(1) (“A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the board.”). The Board’s rule 199 IAC 22.1(1)(d) similarly prohibits discrimination among different customers, *i.e.*, charging customers differently than the tariff provides.

Moreover, the filed rate doctrine prohibits the Respondents from charging for services that do not qualify under their tariffs. “The filed-rate doctrine provides that the legal rights of the utility in the customer are measured exclusively by the published tariff.” *AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd.*, 687 N.W.2d 554, 562 (Iowa 2004). The doctrine “conclusively presumes that both a utility and its customer know the contents and effects of published tariffs.” *Teleconnect Co. v. USWEST Communications, Inc.*, 508 N.W.2d 644, 647 (Iowa 1993). Where there is no applicable tariff to support tariff charges for the services, the LEC has no basis for compensation. *Id.* at 647-48 (“any contract or agreement to provide a tariffed service on terms other than those set forth in the tariff is void.”)

INS has argued that the failure to apply the tariff after April of 1999 is a violation of the filed rate doctrine or is prohibited retroactive ratemaking, but those principles are not applicable to the unusual circumstances of this case. ***Normally, if a filed tariff establishes a rate for a service, such as carrying another carrier’s traffic, that rate would apply to the traffic up to the date that the tariff was determined to be no longer reasonable and lawful. That rule does not apply in these circumstances, however, because there is no filed tariff that properly applies to this traffic.*** The only potentially relevant filed tariff is an access tariff, which does not apply to local traffic. In the absence of a relevant filed tariff, the filed rate doctrine does not apply, and Qwest is not obligated to pay CEA and access charges for this local traffic after April of 1999.

*In re Exchange of Transit Traffic*, 2002 WL 535299, 8, (I.U.B. March 18, 2002), *rehearing den’d* May 2, 2002 (emphasis added). *See also Equal Access Corp. v. IUB*, 510 N.W.2d 147, 150-151 (Iowa 1993) (provider that failed to file tariffs had no basis, including *quantum meruit*, to obtain compensation; Board in its discretion ordered refund of the provider’s charges from twelve months prior); *State Public Defender v. Iowa Dist. Court for Woodbury County*, 731 N.W.2d 680, 684 (Iowa 2007) (“*quantum meruit* cannot be used to supersede the affirmative requirements of a statute”).

Iowa's filed rate doctrine is also the same as the federal doctrine, in which it is absolutely plain that a carrier cannot charge tariff rates for services that do not qualify for the tariff charge in question. *See, e.g., AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998) ("Rates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached"); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 681 (8<sup>th</sup> Cir. 2009) (customers' actions "seeking services contrary to a filed tariff are barred by the filed rate doctrine"); *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8<sup>th</sup> Cir. 2006), *cert. den'd*, 127 S. Ct. 2255 (2007) ("The IUB ... stated that the charges as set out in INS's tariffs do not apply to the type of traffic at issue;" INS could not survive summary judgment on unjust enrichment claim for the traffic); *FTC v. Verity International, Ltd.*, 443 F.3d 48, 62 (2<sup>nd</sup> Cir. 2006) ("[i]f... no filed tariff covered the service... there would be no filed rate to charge").

Therefore, Qwest does not owe payment to the Respondents for the amounts of intrastate access fees that Qwest had disputed and not paid, and Respondents owe Qwest refunds for the amounts that Qwest had paid. The LECs' charges are completely without basis. The Board should order the LECs to refund the intrastate access charges.

***1. The Board Has Authority to Order Respondents to Make Refunds.***

Iowa Code Sections 476.3 and 476.11, and 199 IAC § 22.14 give the Board the authority to order refunds for charges that were collected unlawfully. "The authority to order refunds follows as a necessary part of rate-setting authority." *Equal Access Corp. v. IUB*, 510 N.W.2d 147, 150 (Iowa 1993) (citing *Mid-Iowa Community Action, Inc. v. Iowa State Commerce Comm'n*, 421 N.W.2d 899, 901 (Iowa 1988)). *See also* 199 IAC § 22.14(5)(b)(2), (3) (upon resistance to an access service filing, the Board can either suspend or allow the tariff to become effective, subject to refund). As stated *supra*, the Board has authority over the Respondents' intrastate access rates under Section 476.3 (authority to determine on complaint actions, reasonable rates), and Section 476.11 (authority over intrastate access rates). *See, In re Iowa Telecommunications Ass'n*, 2007 WL 4135212 (Iowa U.B.) (Rel'd Nov. 15, 2007) (authority over intrastate access rates of small LECs). Accordingly, the Board can and should order the Respondents to refund their unlawful intrastate switched access charges.

***2. Qwest Has Identified the Amounts that Respondents Should Refund in Intrastate Access Charges.***

The Board should order the LECs to refund the intrastate access charges at issue in this case.

Those amounts are as follows:

[REDACTED]

Qwest will seek recovery of the applicable interstate access charges in the pending Iowa federal court proceeding.

Respondents have argued that Qwest's witness, Mr. John Devolites, was not able to calculate Qwest's losses with sufficient certainty. This is incorrect. The Board has authority to determine refund amounts without needing exact certitude in the amounts:

The fourth principle is that complaints involving provision of services without a tariff should be resolved efficiently, without other proceedings and the need for lengthy fact-finding proceedings. The board stated that attempting to derive an exact refund formula in this case would consume an inordinate amount of time and board resources and probably would still not yield a mutually acceptable result.

\* \* \*

Regarding the refund to be ordered, the board summarized its views this way:

Ideally the refund amount in this case would be carefully calibrated to prevent Equal Access from benefiting for provision of untariffed services, and to deter other alternative operator services companies from providing services without tariffs. However, the record in this proceeding only allows the Board to estimate the appropriate refund amount to accomplish such a result. It is highly doubtful that an accurate figure could be reached through extended and complex further litigation.

*Equal Access*, 510 N.W. 2d at 151 (affirming the Board's refund order).

Moreover, Mr. Devolites' calculations of the Respondents' improper access fees to Qwest have a very high degree of accuracy. Mr. Devolites used a super-computer, analyzed over 20 million telephone calls, and calculated the exact number of minutes that each LEC delivered to telephone numbers the Respondents admit were associated with their FCSC partners. Mr. Devolites then broke down those numbers by FCSC, once again based on data provided by the Respondents. However, this is still an "estimate" because Mr. Devolites assumed the LECs billed Qwest the LECs' tariffed terminating access rates. He did not look minute by minute on the LECs' access bills to determine whether the LECs accurately billed the rates or not. Instead, he simply presumed they billed correctly. Tr. at 1585-1587. Considering that the LECs' express purpose for pumping traffic was to bill their access rates to IXC's, this is an eminently reasonable presumption to make.

Qwest's damage calculation is eminently reasonable, and calculated with precision. The Board should order a full refund of these inappropriately billed switched access charges. The Board should order repayment of the aforementioned of the intrastate switched access charges with interest, as contemplated by the ITA (intrastate tariff). Again, the ITA tariff incorporates the language of the NECA tariff, with a few limited exceptions. It specifically incorporates the language on interest, and makes interest payments mandatory. See Exhibit 35 (NECA Tariff) §2.4.1(d)(5)(a)(ii).

### **3. *Ordering Refunds Is Not Unfair to the Respondents.***

The Respondents have argued that requiring refunds would be unfair because they have already spent the improperly assessed access charges paid by the IXC's. Thus, even though the LECs were receiving payments thousands of percentage points higher than they had ever received before, they claim to have spent it all. Now they are claiming poverty, and arguing it would harm them to refund the money.<sup>19</sup> On its face, this claim of poverty is unpersuasive because the Respondents simply distributed

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<sup>19</sup> Some of the LECs also claim that the IXC's decision to stop paying switched access payments was improper self help. The Board should reject this argument out of hand. First, the LECs should not be able to argue that they were spending the money like wildfire, and the IXC's have no recourse. Second, an Iowa federal court has specifically sanctioned IXC's withholding payments of access charges when the tariffs do not cover the calls in question. *Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 902-904 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8<sup>th</sup> Cir. 2006) (notes omitted). See *infra* § \_\_\_\_.

(Qwest contends, laundered) the revenues to the persons who knowingly engaged in the traffic pumping abuse: the FCSCs and the Respondents' owners. The Board should not be persuaded by this argument. *See, e.g., Nassen v. National States Ins. Co.*, 494 N.W.2d 231, 238 (Iowa 1992) (punitive damages award upheld in part because of distributions to owners).

Even if the Respondents had a legitimate argument of no longer having the money, the Board has an obligation to award actual damages without regard to the financial condition of the party who caused the harm.

It is axiomatic that the principle underlying allowance of damages is that of compensation, the ultimate purpose being to place the injured party in as favorable a position as though no wrong had been committed.

*Dealers Hobby, Inc. v. Marie Ann Realty Co.*, 255 N.W.2d 131, 134 (Iowa 1977) (quoted in *Ag Partners, L.L.C. v. Chicago Cent. & Pacific R. Co.*, 726 N.W.2d 711, 716 (Iowa 2007)). In civil cases, it is only with respect to punitive damages that defendants' financial condition is considered. *See, e.g., McClure v. Walgreen Co.*, 613 N.W.2d 225, 233 (Iowa 2000) (for question of punitive damages, whose purpose is to punish and deter, fact-finder can consider defendant's financial worth). Here, the LECs billed Qwest and the other IXC for access charges that they had no right to collect. They should be forced to make the IXCs whole for the harm they caused.

Moreover, Qwest expects that the LECs will have help in paying any damages award. As established at hearing, [REDACTED] [REDACTED]. Tr. at 2031-32. Indeed, both Mr. McGuire and Mr. Mart admitted that if damages are imposed, they would go to their FCSC partners and seek repayment. Tr. at 2032-2033, & 2721). A damages award should therefore have the appropriate impact on the FCSC community as well.

There is also a very practical reason for requiring a complete repayment of damages. The entire LEC and FCSC industries are watching this case. If the Board allows traffic pumping without repercussions, Iowa will become a haven for the fraudulent scheme. For example, Great Lakes said that, if permitted, it would continue its FCSC business (Tr. at 2466), and Great Lakes is already pumping 70

million minutes per month. Exhibit 1286 (Hensley Eckert Direct) at 19. Similarly, however, if the Board finds traffic pumping illegal and improper, but allows the LECs to retain their ill-gotten gains, it will create the incentive to participate in the scheme, and then (just like these LECs) plead poverty after they are caught. In fact, to the extent the LECs simply distributed their revenues to their owners, the Board should not be persuaded that the LECs no longer have the money; to deter such fraudulent behavior, the Board should not allow the LECs' owners to retain such distributed profits. *See, e.g., Nassen, supra.* Thus, a failure to award the full damages would create the exact incentives the Board does not want to foster.

Therefore, the Board should order complete restitution – *i.e.*, repayment of the full amount that the Respondents' wrongfully gained and harmed Qwest, with interest. The LECs orchestrated and perpetrated an illegal scheme to bilk monies from Qwest and other IXC's – the LECs should not be heard to complain that it is inconvenient for them to give the money back to the victims of their scams. The law and practical considerations demand it.

V. **TRAFFIC PUMPING IS AN UNJUST AND UNREASONABLE PRACTICE UNDER IOWA CODE SECTION 476.3.**

Under Section 476.3, any practice by an Iowa LEC that is unjust, unreasonable or otherwise violates the law is subject to the Board's authority to determine just and reasonable practices to be observed in their place:

When the board, after a hearing held after reasonable notice, finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the board shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced.

Iowa Code § 476.3(1) (in relevant part). In accordance with Section 476.3, the Board has promulgated Rule 22.1, which requires construing the Board's rules consistent with their purpose, including:

- a. *To allow fair competition in the public interest* while ensuring the availability of safe adequate communications services to the public.
- b. *To provide uniform, reasonable standards* for communications service provided by telephone utilities.

199 IAC § 22.1(1)(a), (b) (emphasis added). Under Section 476.3 and Rule 22.1, and based on the record evidence, the Board should find that Respondents' traffic pumping is an unjust and unreasonable practice, and in violation of the public interest.

**A. Respondents' Traffic Pumping Scheme and Sharing of Revenue With FCSCs Are Unjust and Unreasonable Practices: They Are Contrary to the Purposes of the Switched Access Regulatory Structures and Result in Unreasonable Charges Yielding Unreasonable Profits.**

Traffic pumping schemes are designed around a few key elements: an abuse of a LEC's control over terminating access to its local numbers, free, high volume services resulting in millions of minutes of additional traffic each month, the fact that long distance carriers cannot refuse to deliver traffic to the LEC's exchange, and the sharing, or "kickback," of access revenues among the LEC and the FCSC. These schemes are as abusive as they have been lucrative, and they without question constitute unjust and unreasonable practices under Iowa law.

The FCSCs' free conference and chat line products provided guaranteed volumes of traffic, and plan was described from the beginning as a risk free proposition. Tr. at 1911-12; Exhibit 939. For instance, Free Conference guaranteed Riceville 1 million minutes of traffic per month (Tr. at 1880), and Free Conference suggested to Merchants it would be able to deliver 6-10 million minutes of traffic per month. Tr. at 2008; Exhibit 1005. Free Conference met and exceeded these promises. Tr. at 2039. Moreover, all of the LECs admit that traffic pumping involved splitting of terminating switched access revenue with the FCSC partners. *See, e.g.*, Tr. at 1873-1874, 2027; Tr. at 2238-2239.

Splitting access revenue is an abuse of the access charge regime and is therefore an unfair and unreasonable practice under Iowa Code Section 476.3. As the Board is aware, the access charge regime was instituted in the break-up of AT&T in 1984, and its purpose is clear: to compensate LECs for their costs incurred in an IXC's use of their network to originate or terminate long distance calls.

Access charges were originally established in 1984 as a result of the breakup of the Bell System. Prior to this breakup, the nation had essentially a single long distance carrier – AT&T. AT&T charged its end users long distance charges, and shared a portion of these

charges with the local exchange carriers who originated and terminated long distance calls. The sharing of these revenues, through a settlements process, worked when there was a single long distance carrier. To enable competition in the long distance market, one of the principle goals of the Bell System breakup, the settlements process was replaced by access charges, which ensured all long distance carriers would participate in replacing the funding that had been provided exclusively by AT&T through settlements.

The initial access charges were established through traditional regulatory rate making – LECS put forward their costs, and estimated their call volumes, all designed to ensure LECs earned their authorized rate of return, and no more. There was no provision for LECs to include the costs of third parties in their rates.

Exhibit 1 (Owens Direct) at 113-114.

“Access charges are the means whereby local telephone companies recover from [long distance companies] their share of the cost of the local plant that is used in the origination and termination of interstate calls.” *Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864, 868 (6th Cir. 1991) (quoting *National Assoc. of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir 1984)). In its *Access Charge Reform Order*, the FCC specifically enforced this cost-recovery purpose in the context of preventing CLECs from abusing the access charge regime with excessive tariffed charges:

By this order, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. Specifically, we limit the application of our tariff rules to CLEC [interstate switched] access services in order *to prevent use of the regulatory process to impose excessive access charges on IXCs and their customers*. Previously, certain CLECs have used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.

Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. We accomplish this goal by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. During the pendency of negotiations, or if the parties cannot agree, the CLEC must charge the IXC the appropriate benchmark rate. We also adopt a rural exemption to our benchmark scheme, recognizing that a higher level of access charges is justified for certain CLECs serving truly rural areas.

*In re Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923; 9924-25 ¶¶2-3, 2001 FCC LEXIS 2336, FCC 01-146, CC Docket No. 96-262 (Rel'd April 27, 2001) (*Seventh Report and Order and Further Notice of Proposed Rulemaking*).

Iowa law and this Board both recognize the same cost-recovery purpose of tariff charges, particularly access charges. Iowa Code §§ 476.3 (LEC rates and charges must be “just, reasonable, and nondiscriminatory”); 476.4 (tariff charges must be reasonable, and on filing a proposed tariff, the LEC bears the burden of proving its reasonableness); 476.11 (LEC must provide “just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider.”); *AT&T Communs. of the Midwest, Inc. v. IUB.*, 687 N.W.2d 554, 558-559 (Iowa 2004) (Board did not err in finding CLECs access rates, which were substantially higher than ILECs’ access rates, “unlawful and a deliberate abuse of their monopoly over access services;” reversed as to new rates due to lack of authority to *sua sponte* waive rule requiring CCL charge). For example, the Iowa statute regarding local competition expressly recognizes that a LEC’s prices must be cost-based:

Local exchange carriers shall file tariffs or price lists in accordance with board rules with respect to the services, features, functions, and capabilities offered to comply with board rules on unbundling of essential facilities and interconnection. ***Local exchange carriers shall submit with the tariffs or price lists for basic communications services and toll services supporting information that is sufficient for the board to determine the relationship between the proposed charges and the costs of providing such services, features, functions, or capabilities, including the imputed cost of intrastate access service rates in toll service rates pursuant to existing board orders.*** The board shall review the tariffs or price lists to ensure that the charges are cost-based and that the terms and conditions contained in the tariffs or price lists unbundle any essential facilities in accordance with the board’s rules and any other applicable laws.

Iowa Code § 476.101(5) (emphasis added). To the extent that the LECs have millions of dollars of access revenues available to split with their FCSC partners, by definition, the LECs’ rates cannot be cost based. Because the Respondents’ revenue sharing arrangements with FCSCs deliberately avoid any reasonable relationship between tariff prices and the LEC’s costs, Respondents have contradicted the very purpose of allowing switched access charges.

Moreover, as the evidence in this case shows, traffic pumping spawns the worst in some people: abuse of power, lies, deceit, greed, forging of evidence, pornography accessible to minors, and willful

misconduct.. The Board has clear authority to issue an order stating that traffic pumping is illegal and contrary to the public interest in Iowa. In its order, the Board should so find, and make plain that all the LEC's certificates are amended to prohibit traffic pumping of any kind. The Board should also send a very clear message that the splitting of access revenue is contrary to the public interest in Iowa.

**B. Traffic Pumping is Unjust and Unreasonable Also Because it Abuses the Rural Exemption for CLEC Access Rates; Moreover, the Two Respondents Claiming the Rural Exemption Do Not Qualify for It.**

***1. The Rural Exemption Is Designed to Allow Appropriate Cost-Recovery; It is Not Intended to Allow Rural LECs to Pump Traffic.***

Traffic pumping is especially insidious because it abuses the single exemption that the FCC made in the *Access Charge Reform Order*: the rural access rate exemption. As noted above, the Access Charge Reform Order addresses CLECs' previous abuse of the access regime, which involved filing excessive tariff rates. *Access Charge Reform Order* at ¶¶2-3, 22, 25, 31. *See also In re Orbitcom, Inc.*, 23 F.C.C.R. 13187, 13188 n.6 (Aug. 27, 2008) (citing *Access Charge Reform Order*, "an interexchange carrier (IXC) has no competitive alternative for access to a particular end-user, and, because the IXC pays access charges and recovers those costs through averaged rates, the end-user has no incentive to avoid high-priced providers for access services."). In that order, the FCC limited CLECs' tariffed access rates to the benchmark of their competing ILEC's access rates. *Access Charge Reform Order* at ¶45. To charge higher access rates, the CLEC must negotiate agreements with IXCs. *Id.* at ¶2; 47 C.F.R. § 61.26.

The FCC allows a rural CLEC an exemption from the FCC's CLEC access rate caps, if the CLEC meets at least two elements: they must compete for local exchange customers and they must serve customers only in one-hundred-percent rural areas. *Access Charge Reform Order* at ¶¶ 73, 76, and 79. *The purpose of this exemption for rural CLECs is to allow adequate cost-recovery to be able to offer consumers a competitive choice in local exchange service: the exemption is intended to counteract the implicit subsidy built into a state-wide ILEC's rates, by which the state-wide ILEC recoups its higher rural costs, through its revenues from customers in urban areas.* That is, the FCC's rules for state-wide price-cap incumbents require averaging costs state-wide, and thus implicitly the ILEC's lower-cost urban

areas “subsidize” its higher cost rural areas because the ILEC is required to average its costs over an entire state. This creates a problem for a CLEC providing local exchange service to customers in exclusively rural areas, because the CLEC does not have the lower cost areas to offset the higher rural costs, and if its switched access rates are capped by the state-wide ILEC’s, it is not possible to cover its costs. *Id.* at ¶¶ 64, 79; *see also In re PrairieWave Telecommunications, Inc. Petition et al.*, 2008 FCC LEXIS 1293, FCC 08-49 at ¶4 (Rel’d Feb. 14, 2008).

There is no other policy or public interest basis for the rural exemption other than to ensure that a wholly rural carrier will recoup the higher cost of providing services to customers in rural areas, and thus be able to compete with the ILEC and provide rural customers the benefits of local competition. *See, e.g., Iowa Code § 476.95.* The exemption is expressly premised on the assumption that a rural carrier actually experiences higher costs of service, particularly higher loop costs. *Access Charge Reform Order* ¶¶66, 75. “The factors of longer loop length and lower concentration of potential subscribers are, in turn, what motivate us to permit higher access rates in rural areas.” *Access Charge Reform* ¶75; *see also In re Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; et al.*, 19 FCC Rcd 9108; 2004 FCC LEXIS 2581, FCC 04-110 (Rel’d May 18, 2004) (*Eighth Report and Order* and Fifth Order on Reconsideration) at ¶30 (noting higher costs of serving rural areas, “particularly loop costs”); ¶35 (“The rural exemption was intended to prevent rural competitive LECs with high loop costs from being tied to a competing incumbent’s access rate that reflects the incumbent’s ability to subsidize high-cost, rural operations with more concentrated, low-cost urban operations.”).

In this case, the Respondents’ traffic pumping is plainly contrary to the FCC’s purpose in exempting rural CLECs from the access rate benchmark:

LECs involved in traffic pumping are using access charges for a purpose that was never intended. Access charges are supposed to help to subsidize the local loop. That purpose is totally missing in traffic pumping. Instead:

There is no local loop to subsidize;

The rates LECs charge for access charges have no connection to the volume of traffic flowing through their exchanges;

The LECs are not serving rural customers, but instead FCSCs from California, Nevada, Texas (etc.) who just so happen to locate a conference bridge or router in the LECs' central office; and,

When it is time to calculate access charges based on the actual volumes, the traffic pumpers move to another location so they can start the entire scheme all over again.

Exhibit 1286 (Hensley Eckert Direct) at 22.

In sum, the present access charge structure allows LECs to have control over access to their end user customers - and still bill IXCs access charges – solely because LECs are limited to charging access fees that are just, reasonable, and cost-based. The access charge regime is thus abused by schemes such as traffic pumping, in which by revenue sharing with FCSCs, the LECs extract unreasonable charges from IXCs, obtaining exorbitant profits that bear no relationship to the LECs' costs in providing originating and terminating access to the IXCs.

***2. Respondents Aventure and Great Lakes Never Qualified for the Rural CLEC Exemption From the Access Rate Cap, and Thus Were Obligated to Charge Only the Incumbent LEC's Access Rates, Meaning Qwest's Access Rates of \$0.0055 Per MOU.***

For all of the reasons set forth in this brief, Qwest firmly believes that calls destined for telephone numbers assigned to FCSCs do not qualify for switched access charges. However, even if access charges did apply, Aventure and Great Lakes have been charging Qwest the wrong rates for switched access. Both Great Lakes and Aventure claim to qualify for the "rural exemption" which allows qualifying CLECs to apply NECA band 8 rates. As stated above, in order to qualify for the rural exemption carriers (1) must "compete" for customers with the price-cap ILEC, and (2) one-hundred percent of their customers must be based in a rural exchange (meaning an MSA with less than 50,000 residents). *Access Charge Reform Order* at ¶¶ 73, 79 and 76. Qwest addresses these points in turn.

First, the rural exemption requires competition between the CLEC and the incumbent LEC. Everyone agrees on this point: Qwest (Exhibit 1 (Owens Direct) at 55), Great Lakes (Cross Examination of L. Chu, Tr. at 2632), and Aventure (Cross Examination of McKenna, Tr. at 2305). [REDACTED]

[REDACTED] Tr. at 2633-24. Indeed, Great Lakes does not even have any outside plant. Tr. at 2422. It does not need outside plant

because Great Lakes only serves FCSCs. Tr. at 2422-2423. Given that Great Lakes does not actively compete for actual customers, it is impossible for Qwest to compete against CLECs who can offer a kickback higher than Qwest's complete terminating switched access rate, competition is impossible.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A. [REDACTED].]

Tr. at 2307. Thus, Aventure did not compete for customers through December 2007, and as such did not qualify for the rural exemption during this time frame for that reason. During that entire period, Aventure simply served FCSCs. Tr. at 2250.

Qwest thus respectfully requests that the Board issue the following declaratory findings:

- A declaratory finding that Great Lakes has never competed with Qwest in the Spencer exchange for end-user customers. It has no outside plant and only serves FCSCs. Given that it has never competed with the incumbent LEC, it does not qualify and has never qualified for the rural exemption.
- A declaratory finding that Aventure did not compete for customers with the incumbent LEC in the Sioux City, Salix or any other exchange between its inception and December 2007 because it was building its network. As such, Aventure did not qualify for the rural exemption from its inception through December 2007 for failure to compete.

Additionally, the second requirement of the rural exemption states that the CLEC loses the rural exemption if they serve even one customer in an MSA with greater than 50,000 residents.

We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, *where no portion of the CLEC's service area falls within:* (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(2) an urbanized area, as defined by the Census Bureau. *Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas*, the carrier will be ineligible for the rural exemption to our benchmark rule. ....

*Access Charge Reform Order* ¶76 (emphasis added). Aventure admits as much:

Q. ...You're aware that to get the rural exemption you have to be serving communities of 50,000 access lines or less; true?

A. That's true.

Q. Serving someone in the Sioux City exchange would not qualify; correct?

A. Correct.

Q. If you served one customer out of the Sioux City exchange, you are disqualified for the rural exemption; true?

A. True.

Tr. at 2305.

The evidence is overwhelming that Aventure serves customers out of the Sioux City exchange, a city with greater than 50,000 people. Aventure's true central office is in Sioux City. Tr. at 2272-73. Indeed, Aventure's purported "central office" in Salix is nothing more than a fiber hut containing a few conference bridges. Tr. at 2273-74. Aventure placed its tandem switch in its Sioux City central office. Tr. at 2255. For two years Aventure served exclusively FCSCs, and many of these FCSCs' designated equipment was placed in the Sioux City central office. Tr. at 2278. Mr. McKenna realized Aventure did not qualify for the rural exemption if Aventure served FCSCs out of Sioux City, and as a result argued that his Chief Technical Officer erred when he testified that equipment designated for FCSCs was housed in Sioux City. Tr. at 2282 & 2277-78. However, photographs of the routers in the Sioux City central office proved the truth: Aventure is serving FCSCs out of its Sioux City central office. Tr. at 2282-2286; Exhibit 1380. Indeed, a vast percentage of Aventure's contracts with FCSCs specifically stated that Aventure would serve its FCSC partners out of Sioux City. Tr. at 2283-2286 and Exhibits 1043, 1045, 1046, 1048. Aventure tried to pawn this off as a typographical error; however, it is hard to believe it was an error when it happened repeatedly and routers used for international and credit card calling FCSCs were located in the Sioux City exchange.

In addition, CLECs involved in traffic pumping (*i.e.*, Great Lakes and Aventure) necessarily serve customers in metropolitan areas. For example, Free Conference and Global Conference are based

in Los Angeles (see Exhibits 147, 105); Audiocom is based in Las Vegas (Exhibit 915); and Magellan 21 is based in Provo, Utah. Exhibit 902. Unlike traditional end-users who have a physical presence in the local exchange, FCSCs do nothing but send computers (conference bridges, chat boxes, and routers) to the LECs' central offices. The FCSCs do not live in the community, pay taxes, or have a home or business there. Indeed, in virtually every circumstance, the FCSC did not even visit the rural community. The testimony of Jeff Owens makes this point plain:

An illustration will help make the point. Pep Boys has branches all over the United States, but, I will assume, has its home office in New York City. Even though Pep Boys is based in New York, it has an actual location in each rural location because it has employees, activities, and an actual premises. However, this is not true for FCSCs. Not only are they not end users, they have no premises in Iowa. In each and every instance, the FCSCs do not have employees in Iowa, and only in the rarest circumstances did the FCSCs even have an employee ever visit the central office where their equipment was located. This is anything but serving rural customers. It is an attempt to manipulate the system and the rules plain and simple. This conclusion is not without precedent. Before one can attend the University of Iowa as an Iowa resident, a student must actually live in Iowa for a designated period of time. Placing a computer in the state does not create residency.

Exhibit 1275 (Owens Rebuttal) at 70. Questions from Board Member Hanson picked up on the preposterous findings that would result if the location of a piece of equipment determined a customer's residency:

BOARD MEMBER HANSON:... I have equipment in northeast Iowa, but I'm not in northeast Iowa, and I don't live there anymore. So they have equipment there, but ... [y]our customers are not necessarily themselves located in Spencer?

THE WITNESS: That corporate office may not be, no.

BOARD MEMBER HANSON: Their equipment is located there?

THE WITNESS: Correct.

BOARD MEMBER HANSON: If Bill Gates had one of these companies and he located his equipment in San Juan, that wouldn't make him a Puerto Rican, right?

Tr. at 2467-68. A finding that a piece of equipment dictates the residency of a person flies in the face of all logic. If this were true, a college student could get in-state tuition simply by sending a computer to Iowa a year or two before he or she applied for school. Common sense dictates that serving rural customers means serving customers based in the rural community, with an actual presence in the community. Urban customers are not transformed into rural residents simply because they forward a piece of equipment to rural Iowa.

Qwest respectfully requests that the Board issue the following declaratory findings:

- The overwhelming evidence is that Aventure serves and has always serves customers based in the Sioux City exchange. Given that it has serves customers in an MSA of greater than 50,000 people, Aventure does not qualify and has never qualified for the rural exemption.
- FCSCs are not residents of the communities where their conference bridges are located. FCSCs do not pay taxes, employee residents or otherwise have a physical presence in the community. It is counter-intuitive to find that placement of a computer in a rural area creates residency in that rural community. As such, FCSCs are not residents of Spencer, Iowa, Salix, Iowa or whatever rural community houses their computers. Rural residency requires more. As such, Great Lakes and Aventure are serving FCSCs from the locations where they actually exist, including Los Angeles, Las Vegas and San Diego. Given that these communities are greater than 50,000 people, neither Aventure nor Great Lakes have ever qualified for the rural exemption.

**3. *The Board Has Authority to Make These Findings and Conclusions.***

Meanwhile, Aventure argues that the Board need not consider this evidence, because the issue of rural CLEC exemption is for the FCC to determine. This is incorrect. The Board most definitely has jurisdiction over Aventure as a CLEC certificated by the Board. Iowa Code § 476.101(1). Aventure's conduct in deliberately taking advantage of the FCC's rural CLEC exemption is directly relevant to the Board's authority to determine whether Aventure has provided services in the public interest. The Communications Act and the FCC recognize at the most fundamental level that it is the state commissions who set the requirements for companies to obtain the privilege of operating as local exchange carriers. For example, 47 U.S.C. § 203 requires carriers to file tariffs stating all charges prior to providing interstate communications. Title 47 does not actually define "carrier," beyond specifying that it means a "person engaged as a common carrier for hire, in interstate or foreign communication by wire..." 47 U.S.C. § 153(10). Title 47 leaves to the states the determination of what regulatory conditions a person must meet in order to be "engaged as a common carrier for hire" in each state. *I.e.*, LECs must

meet state certification requirements in order to come within the definition of carriers under the Communications Act, *i.e.*, to be authorized to provide interstate access.

The Board clearly has jurisdiction over the LECs' certificates.

1. ... **[A] certificate shall be issued by the board, after notice and opportunity for hearing, if the board determines that the service proposed to be rendered will promote the public convenience and necessity,** provided that an applicant other than a local exchange carrier, as defined in section 476.96, shall not be denied a certificate if the board finds that the applicant possesses the technical, financial, and managerial ability to provide the service it proposes to render and the board finds the service is consistent with the public interest. ... The board may establish reasonable conditions or restrictions on the certificate at the time of issuance.

\* \* \*

9. **A certificate may, after notice and opportunity for hearing, be revoked by the board for failure of a utility to furnish reasonably adequate telephone service and facilities.** The board may also order a revocation affecting less than the entire service territory, **or may place appropriate conditions on a utility to ensure reasonably adequate telephone service.** Prior to revocation proceedings, the board shall notify the utility of any inadequacies in its service and facilities and allow the utility a reasonable time to eliminate the inadequacies.

Iowa Code § 476.29(1), (9) (in relevant part) (emphasis added). *See also* Iowa Code § 476.101 ("A certificate of public convenience and necessity to provide local telephone service shall not be interpreted as conveying a monopoly, exclusive privilege, or franchise."). The Board plainly does have the authority to set requirements for Iowa LECs' to retain their certificates, such as to declare traffic pumping illegal and prohibit LECs from engaging in it.

Accordingly, to the extent the Board finds an Iowa LEC's practice is unfair or unreasonable, or otherwise not in the public interest, the Board can and should find the practice violates the LEC's Iowa certification – regardless that it involves interstate conduct or federal law. As the evidence shows, the traffic pumping LECs are abusing their Iowa certificates against the public interest in a highly unreasonable scheme. The Board therefore has full jurisdiction and authority to stop the Iowa LECs' participation in traffic pumping regardless that it involves interstate traffic.

More importantly, the Board has the authority to find the facts on which the rural CLEC exemption is based: whether Aventure competes for end user customers in its exchange area (plainly, no), and whether Aventure's customers are solely located within rural areas (also plainly, no). Therefore, the

Board should directly address Aventure's conduct *vis a vis* its certificate, and should enter the findings of fact on this issue that Qwest recommends *infra*.

**C. Traffic Pumping Is Unjust and Unreasonable Because it Creates the Perverse Incentive to Defraud the Universal Service Fund.**

Qwest also found that Aventure was claiming and obtaining millions of dollars in universal service payments each year for providing services to FCSCs. Tr. at 2250 (Aventure only served FCSCs through 2007). To obtain USF funds, Aventure files petitions with the FCC seeking up to \$800,000 per quarter. Exhibit 1041. This is over \$3 million per year! The USF distributes money to rural telecommunications providers. *In re: Dallas County Wireless, Inc.*, 2008 Iowa PUC LEXIS 154, Docket No. 199 IAC 39.2 (Iowa PUC April 10, 2008).

Thus, by making this application for universal service funds, Aventure is making a representation that it is providing service to end-users based in rural Iowa. In reality, however, Aventure does no such thing. As described above, Aventure serves FCSCs in Sioux City, an urban exchange. More importantly for this argument, however, is that Aventure made these USF applications based exclusively on services provided to FCSCs. Tr. at 2250. As if this was not enough alone, Aventure then misrepresents facts in its application. Aventure's USF Application claimed that Aventure served 3008 access lines as of June 30, 2007. Exhibit 1041. However, a document created on the same date showed 2420 access lines on that same date. Exhibit 1042; Tr. at 2270. Aventure admitted the rest were "test" lines that were never in service. Tr. at 2270-71; Exhibit 192 (Greeno Depo.) at 66. Thus, Aventure seriously overstated the number of lines it served. The application also stated that Aventure serves customers in nine rural exchanges. Exhibit 1041. In reality, Aventure admitted it only served FCSCs out of one rural exchange, Salix. Thus, Aventure's USF application not only seeks \$800,000 for one quarter for serving FCSCs, but in addition it seriously misrepresents facts to the FCC in the process. The following exchange with Mr. McKenna, Aventure's President is instructive:

Q. And so there's no lines into the Sloan exchange; true?

A. True.

Q. And then you have Castana, 127 lines, Hornick, 183 lines. The only exchange into which any lines existed was into Salix; correct?

A. Correct.

Q. And you realize that these numbers, these lines associated with various exchanges, are what determine USF payments? You're aware of that?

A. Yes.

Q. And you're also aware that many of these lines were never even in service to anyone, they were just test lines so you could make sure the calls worked; true?

A. Some of them are, yes.

Tr. at 2269. It is absolutely apparent that Aventure actively defrauded the Universal Service Fund by (1) seeking payments due exclusively to interactions with FCSCs, (b) by grossly inflating the number of access lines it serves, and (c) by grossly inflating the number of exchanges it operates in. Qwest firmly believes it is an abuse of the USF *per se* for seeking funds associated with serving FCSCs.

Aventure realizes that the Board's designation of it as an Eligible Telecommunications Carrier or ETC is what authorizes Aventure to seek payments from the USF. Tr. at 2264. As stated above, the Board has jurisdiction over every LEC's certificates. See *supra* at Section V.B. Moreover, the Board has joint jurisdiction over the USF, because it defines who is eligible to become an ETC. 47 U.S.C. § 254; 199 IAC §39.2; *In re: Dallas County Wireless, Inc.*, 2008 Iowa PUC LEXIS 154, Docket No. 199 IAC 39.2 (Iowa PUC April 10, 2008). Given this evidence and abuse, the Board should revoke Aventure's ETC designation as part of its public interest inquiry into this docket.

**D. Traffic Pumping is Unjust and Unreasonable as An Abuse of Numbering Resources.**

The Board's rules also reflect that the Board has the power to regulate the Respondents' use of numbering resources, which the evidence shows the Respondents have abused in traffic pumping.

Any communications service provider, including but not limited to local exchange carriers ... applying for numbering resources with the North American Numbering Plan Administrator (NANPA) or the Pooling Administrator (PA) shall send a draft application or executed application to the board by facsimile transfer or electronic mail at least two days prior to the date on which the original application is to be received by the NANPA or PA. A draft application shall contain substantially the same information that is to be contained in an executed application.

199 IAC § 22.24(1) (in relevant part). The Board has recognized previously that the FCC gives authority to the state commissions to overrule NANPA denials of requests for numbering resources. *In re Qwest Corp.*, 2008 Iowa PUC LEXIS 138, Docket No. WRU-08-10-272 (March 24, 2008) (citing 47 C.F.R. § 52.15(g)(4); FCC 01-362, ¶ 64).

Respondents' traffic pumping clearly abuses numbering resources. First, some of the Respondents (Great Lakes and Aventure) have obtained tens of thousands of telephone numbers from NANPA, which are beyond their needs for end user customers in their local exchange areas. Exhibit 1068 (Great Lakes/Nelson Depo.) at 28-29; Exhibit 192 (Greeno/Aventure Depo.) at 60-62 and Tr. at 2263-2264. Second, Respondents obtained those thousands of telephone numbers in order to allow FCSCs to frequently change the telephone numbers that they advertised for "free" calling services. Exhibit 1292A (Qwest 30(b)(6) Depo.) at 28. Third, the LECs involved in traffic laundering (Riceville, Superior, Reasnor, and Great Lakes) all used numbers in exchange areas different than the exchange to which the NPA-NXX was assigned. ATIS – which Superior admits is the "standards making body for the telecommunications industry" – specifically states that LECs are required to use numbers in the exchange to which they are assigned. Exhibit 1359 at §2.1.4. Thus, Respondents knowingly obtained numbering resources to help them wrongfully perpetrate traffic pumping.

Hence, the Board should find that traffic pumping is an unfair and unreasonable practice because it requires the abuse of numbering resources. The Board should prohibit the Respondents from obtaining any further numbering resources for traffic pumping, and should require the Respondents to return their traffic pumping telephone numbers to NANPA.

**E. Traffic Pumping is Unjust and Unreasonable Because it Gives Access to "Free" Pornographic Services on Telephone Numbers that Cannot be Blocked.**

***1. Traffic Pumping Violates the Public Interest In Protecting Children and Unconsenting Adults from Indecent Communications.***

The Iowa traffic pumping scheme is unfair and unreasonable because it is contrary to the compelling public interest of protecting children from pornographic or adult-content communications. This public interest is most clearly evidenced by the federal telecommunications laws codified in 47 U.S.C. § 223, and the FCC's regulations and decisions promulgated thereunder to protect minors from "indecent communications." Section 223(c) requires that LECs not provide access to indecent communications (essentially, pornographic and adult-content services) unless a customer has affirmatively requested such access from their LEC:

[A] common carrier ... shall not, to the extent technically feasible, provide access to a[n] [indecent] communication ... from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

47 U.S.C § 223(c)(1).<sup>20</sup> This statute thus applies to LECs that “remit[, in whole or in part,” charges from subscribers to the service provider.

The Respondents may argue that the statute does not apply to their traffic pumping, because the services are “free,” and thus there is no “identifiable charge” for the services. This, however, would ignore the FCC’s interpretation of the statute:

A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication described in section 223(b) of the Act from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

47 C.F.R. § 64.201(b).

[W]e clarify that Section 64.201 requires IXCs and other carriers that contract with adult message service providers to notify the LECs providing subscriber billing for calls to these services that such calls should be separately labeled as calls to adult message services on the bill.

*In re Regulations Concerning Indecent Communications by Telephone*, 10 F.C.C. Rcd 665, FCC 94-346 ¶10 (Rel’d Jan. 19, 1995) (Order on Partial Reconsideration).

We interpret ‘provider of communications’ to encompass intervening carriers, such as IXCs, as well as originating adult message services. This interpretation, in our view, is consistent with Congress’s goal of providing broad protection to the public.

*Id.* at n. 16.<sup>21</sup> The FCC’s interpretations of Section 223 thus evince a broad reading of the statute to fulfill the legislative intent of protecting the public interest.

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<sup>20</sup> The statute does not define “indecent” communication. Based on precedent in the broadcasting context, the FCC defined the term: “in the dial-a-porn context, we believe it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.” *In re Regulations Concerning Indecent Communications by Telephone*, 5 FCC Rcd. 4926, FCC 90-230 ¶12 (Rel’d Jun 29, 1990). This definition was upheld on appellate review. *Information Providers Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-876 (9<sup>th</sup> Cir. 1991). In this case, Respondents do not refute that several FCSCs provided “free” services that fall within this definition.

The public interest embodied in Section 223(c) is to protect minors from exposure to adult-content material, independent of whether the service provider charges the caller (or as in traffic pumping, the service provider earns kickbacks from the purportedly “terminating” LEC’s unlawful access charges to IXCs). Specifically, Section 223(c) imposes the requirement of not allowing access to indecent communications (except where affirmatively requested by customers):

Whoever knowingly--

(A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person’s consent, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person’s control to be used for an activity prohibited by subparagraph (A), shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

47 U.S.C. § 223(b)(2). Section 223(b)(2) thus expressly focuses on the provision “for commercial purposes” of indecent communications to minors or to adults that did not consent to it, regardless of whether there is a charge associated with the call.

The express focus on “commercial purposes” is consistent with the legislative purpose of Section 223, and the FCC’s regulations promulgated thereunder, which focus especially on the harm to minors from exposure to indecent communications.

... Section 223 of the Act was amended in November 1989 to regulate (rather than prohibit) indecent telephonic communications for commercial purposes. The new Section 223 continues the outright ban on obscene communications for commercial purposes, but limits minors’ access to indecent communications. The Section extends the criminal and civil penalties for both obscene and indecent telephonic communications to intrastate as well as interstate communications. As noted previously, Section 223(b) reestablishes an affirmative defense to prosecution for providers of indecent communications that comply with Commission regulations. Section 223(c) requires, with certain exceptions, that carriers block access to adult message services unless a subscriber requests the carrier in writing to provide access.

*In re Regulations Concerning Indecent Communications by Telephone*, 5 FCC Rcd. 4926, FCC 90-230 ¶

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<sup>21</sup> Respondents did not inform Qwest that any of their traffic or telephone numbers were being used to provide adult content, and instead, assigned multiple telephone numbers to their pornographic/adult-content FCSCs to allow them to change their telephone numbers frequently to avoid detection by IXCs. Tr. at 1287-1288.

7 (Rel'd Jun 29, 1990), *aff'd*, *Information Providers Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 874-876 (9<sup>th</sup> Cir. 1991). The legislative history shows the intent of the 1989 amendment of Section 223 was to “result in ending the availability of dial-a-porn to children, once and for all.” 135 Cong.Rec. H8886 (November 17, 1989) (statement of Rep. Rinaldo).

Accordingly, the FCC explained its regulations regarding indecent communications with particular emphasis on that protective intent:

***We conclude that our regulations represent a narrowly tailored method of achieving a compelling government interest, namely, protecting children from indecent material.***<sup>[FN17]</sup> The regulations are designed to make indecent communications available to adults who affirmatively request the service, but unavailable to minors. .... Without the additional restrictions on access put in place by dial-a-porn providers (scrambling, access codes, credit cards), children will still be able to gain access to indecent communications.

\* \* \*

***FN17 The Supreme Court has recognized that the government has a compelling interest in protecting children from exposure to indecent dial-a-porn.*** *Sable* at 2839.

*In re Indecent Communications*, 5 FCC Rcd. 4926 at ¶16 (emphasis added). The FCC further explains the practical necessity of Section 223(c):

It was reasonable for Congress to conclude that its reverse blocking scheme would be considerably more effective than a voluntary scheme in preventing children from accessing indecent material. A voluntary blocking scheme would be far less effective in protecting children from exposure to indecent material because ***it is likely that most parents would not realize the need for blocking until their children had already obtained access to indecent messages. Nor would neighbors or relatives where children are only occasional visitors recognize the need to, nor act to, have access blocked. It is reasonable, therefore, to implement a reverse blocking scheme that brings the potential problem to the attention of parents before the damage to children has occurred, rather than waiting until the damage has been done.***

*Id.* ¶18 (emphasis added). Thus, due to the compelling interest in protecting minors from indecent communications, access to pornographic or other indecent communications is more restricted than 900 number services in general. *See e.g.*, 47 C.F.R. § 64.1508 (“Local exchange carriers must offer to their subscribers, where technically feasible, an option to block access to services offered on the 900 service access code.”). *In re Petition by National Association for Information Services*, 8 FCC Rcd. 698, 701, FCC 93-45, n.47 (Jan. 22, 1993).

A significant portion of the traffic at issue in this case is so-called “free” adult content or pornographic calling. Exhibit 1286 (Hensley Eckert Direct) at 5-11 (Tr. at 964-970); Exhibit 1342 (Phillips Direct) at 12-13; Exhibit 1343 (Phillips Rebuttal) at 8 (noting concern that none of the Respondents denies that a large amount of the traffic pumping at issue is pornographic or adult content). Qwest’s witnesses found that pornographic and adult content was “front and center for several of the LECs.” Exhibit 1286 (Hensley Eckert Direct) at 7. This is particularly true of Merchants and Dixon. *Id.*; Exhibit 1293 (Hensley Eckert Rebuttal) at 18-19. For example, Merchants received over 118 million minutes of traffic procured by Audiocom, a known purveyor of pornographic calling. Owens Direct at 156. Using conservative estimates, Merchants billed IXC’s in excess of \$9 million in access fees over an eighteen month period on Audiocom’s adult-content traffic. Tr. at 2016-2017. At the hearing, none of the Respondents refuted either the pornographic nature of such services as ManHole, MaleCall, hotlivesexchat.com, or any of the other adult-content FCSCs that Qwest has identified. Exhibit 1286 (Hensley Eckert Direct) at 7, 10; (Exhibit 1293 (Hensley Eckert Rebuttal) at 19.

Providing “free” pornographic calling and adult content chat lines on local Iowa telephone numbers clearly violates the public interest. Most notably, parents are not able to block such calls on their telephones, and therefore, have little or no ability to restrict their children from accessing such services. Tr. at 1304-1306. The FCC has noted the importance of protecting children from adult-content services:

With adult content available from a myriad of sources, now more than ever it is *important for carriers, content providers, and parents to know what is being done by industry to prevent access to adult content by minors, as well as what they can do to protect their children.* Therefore, I ask you to help educate parents about their options with regard to content access by minors. *Let parents know that they can block access to pay-per-call voice services and access to the mobile Internet through their children’s handsets; inform parents of the types of content that children will have access to through download services; and ensure that parents are aware of the different types of services to which their children will have access.*

Second, I ask that you consider whether the availability of adult content via mobile devices warrants changes to CTIA’s carrier code of conduct to promote industry self-regulation. Through responsible action on the part of wireless carriers and content providers this important social goal can be achieved without government intervention and without interference to the provision of content to adults.

Finally, I encourage you to examine the efforts that are being made by both government

and industry in other countries to address the issue of access to adult content by minors. For example, the United Kingdom, Australia, and Israel have each recently confronted this subject, with differing results in each case. This issue is not confined to our borders and we should be mindful that other parts of the international telecommunications industry are facing similar circumstances.

By encouraging independent initiatives by your members and giving parents access to the tools needed to protect their children from inappropriate content you can encourage the continued growth of wireless services as an integral part of every American's daily life.

2005 FCC LEXIS 1095, 1-3 (FCC 2005) (letter from Wireless Telecommunications Bureau Chief Muleta to the president of CTIA, the Wireless Association, Feb. 15, 2005) (emphasis added).

Even for consumers who do not have minor children with access to their telephones, providing adult content calling services in a manner that disguises on the consumer's telephone bill the adult-nature of the calls is contrary to the public's expectation that such services are only available by pay-per-call, which clearly appears as such on their bills. Exhibit 1286 (Hensley Eckert Direct) at 7.

At least some of the Respondents knew that they were providing these adult content services. Merchants' General Manager, Rex McGuire, saw a commercial on television advertising the service, and did nothing to put the required parental 900 number-type protections in place. Exhibit 1286 (Hensley Eckert Direct) at 9-10. [REDACTED]

[REDACTED]"] Exhibit 1293 (Hensley Eckert Rebuttal) at 17-18. [REDACTED]

[REDACTED]. Tr. at 2042-2043.

Indeed, Ms. Eckert called these numbers to verify, and there were no technological protections in place whatsoever. Tr. at 1300-1301. [REDACTED]. Tr. at 2042-2044. Clearly, this evidence shows that Respondents' traffic pumping practices are contrary to the public interest and should be barred.

**2. Protections Concerning Indecent Communications Are Vitaly Important to Iowa's Public Interest.**

The FCSCs free pornographic calling raises more than questions of federal law and policy. The Board has authority to regulate Iowa LECs for consumer protection and other public interests. *See, e.g.*, Iowa Code § 476.95 (4) (“Regulatory flexibility is appropriate when competition provides customers with competitive choices in the variety, quality, and pricing of communications services, and when consistent with consumer protection and other relevant public interests.”); 476.3 (Board authority to resolve complaints as to “anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter”); 476.29(1) (certificates should be granted if the Board finds the “service proposed to be rendered will promote the public convenience and necessity”).

Consumer protection, unfair business practices and implementation of federal policy in the telecommunications field particularly requires active regulation by both the state commissions and the FCC. This is true regardless that consumer protection frequently involves interstate traffic and state commissions do not have authority to set interstate rates or to approve interstate tariffs.

*While it is certainly true that the FCC has jurisdiction to take consumer complaints about cramming, see 47 U.S.C. § 207, it does not necessarily follow that the states may not also investigate such complaints. In fact, the FCC recognized the important role of the states in Vonage, a decision declared by the Eighth Circuit to be binding on the federal courts. In re Vonage Holdings Corp., 2004 FCC LEXIS 6429, WC Docket No. 03-211, FCC 04-267...(FCC rel. Nov. 12, 2004) (“Vonage Order”), aff’d, Vonage Holdings Corp. v. Minn. Pub. Utils. Comm’n, 394 F.3d 568 (8th Cir. 2004). In the Vonage Order, the FCC preempted an order of the Minnesota Public Utilities Commission that applied Minnesota’s traditional telephone regulations to Vonage’s voice-over Internet protocol service. The FCC emphasized that the voice-over Internet protocol service could not be separated into interstate and intrastate communications without negating valid federal rules and policies. Vonage Order P 1. But, the FCC noted, “states will continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints.” Id. In a statement attached to the Vonage Order, FCC Chairman Michael K. Powell observed that the states play an important role in combating the practices of slamming and cramming:*

*There will remain very important questions about emergency services, consumer protections from waste, fraud and abuse and recovering the fair costs of the network. It is not true that states are or should be complete bystanders with regard to these issues. Indeed, there is a long tradition of federal/state partnership in addressing such issues, even with regard to interstate services. For example, in long distance services, the FCC and state*

commissions have structured a true partnership to combat slamming and cramming.

Vonage Order, Statement of Chairman Michael K. Powell. While the cases and FCC orders cited by One Call might indeed lend support to One Call's claim for federal preemption, none of them establish a "facially conclusive" case for preemption at this stage in the proceedings.

*OCMC, Inc. v. Norris*, 428 F. Supp. 2d 930, 938-939 (S.D. Iowa 2006) (note omitted; emphasis added).

The *OCMC* case thus rejected in the slamming context any attempt to limit the state commission's authority to regulate for consumer protection, simply because interstate traffic was involved. Likewise, the Board has already rejected any such artificial limit on its jurisdiction.

Evercom argues that questions concerning the duties and liabilities of telephone companies with respect to interstate and international communications service, and the charges they impose, are governed solely by federal law.

\* \* \*

The Board and the U.S. District Court for the Southern District of Iowa have already ruled adversely to Evercom's argument. *ILD; OCMC v. Norris*, 428 F. Supp. 930, 938 (S.D. Iowa 2006). *The Board has jurisdiction over cramming complaints that involve interstate telephone calls, and it has jurisdiction over the complaint in this case.*

*In Re Office of Consumer Advocate v. Evercom Systems, Inc.*, 2007 Iowa PUC LEXIS 467, 16-18, Docket No. FCU-06-40 (Iowa PUC Dec. 6, 2007) (emphasis added). *See also In re Iowa Telecommunications Services, Inc., v. South Slope Cooperative Tel. Co.*, 2007 Iowa PUC LEXIS 15, 6-9, Docket No. FCU-06-25 (Iowa PUC January 23, 2007) (interpreting federal law and applying same to question of whether Iowa LEC was a CLEC in certain exchanges); *Office of Consumer Advocate v. America's Tele-Network Co-op*, 2001 WL 306253 (Iowa U.B.) (IUB Feb. 26, 2001) at 6 (rejecting motion to exclude evidence of slamming cases in other states, because such conduct was relevant to Board's determination); *WWC Holding Co., Inc. v. Sopkin*, 488 F.3d 1262, 1267 (10<sup>th</sup> Cir. 2007) (state commission has authority to require wireless carriers to comply with consumer protection requirements to qualify for ETC status, and "the FCC has not said that a state must parse out the application of these requirements to avoid affecting the interstate services of carriers providing bundled services.").

The Board's ruling on traffic pumping is necessary to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."

Most particularly, the Board's ruling is necessary to ensure that traffic pumpers can no longer profit from evading the federal law that protects minors from adult service calls on telephone numbers that cannot be blocked. 47 U.S.C. § 223. The Respondents were only able to pump extremely high volumes of adult content traffic by abusing the privilege to operate as Iowa LECs under certificates issued by the Board. In addition, Respondents' local exchange tariffs provide that customers can block 900 and 976 telephone numbers, but traffic pumping contradicts the very purpose of such tariff provisions. Exhibit 1286 (Hensley Eckert Direct) at 10; Exhibit 38.

Accordingly, the Board should exercise its authority to require that Respondents certify that they are not engaging in traffic pumping, and in particular, not allowing adult-content services to be provided over non-blockable telephone numbers, as conditions of retaining their certificates.

**F. Traffic Pumping Is Unjust and Unreasonable Because it Forces Legitimate Service Providers to Compete With the FCSC's Wrongfully "Free" Services, And Does Not Contribute to Economic Development in Iowa.**

Traffic pumping is also unfair and unreasonable in its distortion of the market for legitimate conference call (and other calling) services. In addition, it does not serve the public interest through any purported economic development in Iowa.

First, traffic pumping harms development of the calling services industry by decreasing fair competition. Telecommunications policy in the United States, and in particular in Iowa, has for decades favored and encouraged development of competition, new technology and services for telecommunications consumers.

1. Communications services should be available throughout the state at just, reasonable, and affordable rates from a variety of providers.
2. In rendering decisions with respect to regulation of telecommunications companies, the board shall consider the effects of its decisions on competition in telecommunications markets and, to the extent reasonable and lawful, shall act to further the development of competition in those markets.
3. In order to encourage competition for all telecommunications services, the board should address issues relating to *the movement of prices toward cost and the removal of subsidies in the existing price structure of the incumbent local exchange carrier.*

I.C.A. § 476.95(1), (2), (3) (emphasis added). The plain language of these rules shows how traffic pumping distorts the marketplace. Traffic pumping depends upon long distance carriers subsidizing the very existence of the FCSCs. The LECs split the fees paid by long distance carriers with the FCSC and are the revenue stream used to pay for the purportedly “free” conference, pornographic chat, and international calling services. The LECs are using the fees from the long distance carriers to subsidize these services, which in reality are anything but free. Exhibit 1286 (Hensley Eckert Direct) at 16; see also 47 U.S.C. § 254(f) (bars using a monopoly service like switched access to subsidize a competitive service like conferencing). Moreover, traffic pumping requires legitimate calling service providers to compete with companies that are illegitimately offering conference call services for “free,” based on fraud and regulatory arbitrage. Exhibit 1286 (Hensley Eckert Direct) at 22.

Second, traffic pumping does not result in economic development for Iowa. The FCSCs pay no taxes, and pay no fees. The FCSCs do not add a single person to the work force in Iowa. The FCSCs do not even have a presence in Iowa. The FCSCs do not make charitable contributions, or help to pay for parks, or roads. Exhibit 1343 (Phillips Rebuttal) at 5-6. There is nothing that traffic pumping adds to the Iowa economy. Traffic pumping has simply lined the pockets of the owners of the FCSCs (all of which are located in urban areas, and all but one are located outside of Iowa), and the Respondents. Exhibit 1342 (Phillips Direct) at 15. There is no public benefit to traffic pumping.

**G. Qwest’s Unjust Discrimination Claim: If the FCSCs Were Customers as the LECs’  
Allege, Then Respondents’ Traffic Pumping Scheme is Premised Upon  
Discrimination in Violation of Iowa Law.**

If the Board were to find that the FCSCs qualify as local exchange customers of the Respondents (and as the facts above show the FCSCs are not local exchange customers), then the Respondents traffic pumping is premised upon unlawful discrimination among customers. Section 476.5 prohibits LECs from discriminating among customers of tariffed services:

No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage.

Iowa Code § 476.5 (in relevant part). In accordance with Section 476.5, the Board's rule prohibits discrimination as well:

Application and purpose of rules. The rules shall apply to any telephone utility operating within the state of Iowa subject to Iowa Code chapter 476 .... These rules shall be construed in a manner consistent with their intent:

\* \* \*

*d. To ensure that no telephone utility shall unreasonably discriminate among different customers or service categories.*

199 IAC § 22.1(1)(d) (emphasis added).

Contrary to Section 476.5 and Rule 22.1(d), traffic pumping is founded upon two forms of discrimination. First, traffic pumping only works if the LECs kickback millions of dollars to their FCSC partners. Unless the LECs agree to this kickback, the FCSCs will not do business with the LECs. The written contracts between the LECs and FCSCs make this absolutely plain. Thus, traffic pumping is premised upon this illegal rebate, which the LEC's true end-user customers never receive. The FCC issued a decision that shows the illegality of the LECs scheme with their FCSC partners. *In re AT&T's Private Payphone Commission Plan*, 3 FCC Rcd 5834 (Rel. Oct 3, 2988), concerned a situation where there were three parties: (1) AT&T was a provider of operator assisted calls from payphones; (2) the payphone operator; and (3) the end-user making the operator assisted call from the payphone. AT&T received tariffed payments, and payphone operator received a payment as well. The FCC specifically stated that the scheme was allowable only because the end-user customer (the person making the call) was paying a tariffed rate for an operator assisted call and was not receiving the rebate:

Section 203 of the Act states that "no carrier shall... refund or remit payment by any means or any device any of the charges so specified...." The purpose of the anti-rebate provision of the Act is to prevent a carrier from making off-tariff deals with certain customers.... In the instant case, the end-user fully pays the tariffed rate and receives no commission.

*Id.* at ¶¶20-21. Here, the LECs are paying millions of dollars in marketing fees to the exact parties they (erroneously) claim are end-users. This scheme is therefore *per se* illegal.

Second, the evidence shows the Respondents' traffic pumping involves the LECs providing services to their FCSC partners for free, while the LECs' true end-user customers (to the extent they had

any retail, end user customers) pay tariffed rates. Exhibit 1286 (Hensley Eckert Direct) at 23. Thus, traffic pumping is premised upon two forms of discrimination both of which violate Iowa law. The Board should not allow a scheme premised upon illegality to stand; it should be deemed *void ab initio*. Cf., Iowa Code § 476.8 (unreasonable charges declared unlawful).

This is plainly a matter over which the Board has jurisdiction. The statutes that prohibit discrimination among customers are in the Board's authority to apply and interpret as to the relationships between the LECs and their purported local exchange customers and/or business partners. Iowa Code §§ 476.3 (prohibiting discriminatory rates, charges, services, practices); 476.5 (prohibiting discrimination in providing tariffed services); 199 IAC § 22.1(1). None of these statutes and rules draws any distinction between whether the tariffed services are intrastate or interstate, and by implication, the statutes therefore prohibit discrimination as to all. Thus the Board is charged with preventing discrimination.

**H. The Board Should Enter an Order Finding That Traffic Pumping is an Unjust and Unreasonable Practice.**

Based on the above, and pursuant to the Board's authority to resolve formal complaints (Iowa Code § 476.3; 199 IAC §§ 6, 7) and to issue declaratory orders (199 IAC § 4.1), the Board should find that the traffic pumping scheme perpetrated by the LEC Respondents is unfair, unreasonable, not in the public interest, and violate several terms of the LECs' local exchange and switched access tariffs. The Board's order should send a very clear message that schemes of this type will not be tolerated in Iowa, which is relief that the Board clearly has statutory authority to give. Iowa Code § 476.3(1) ("the board shall determine just, reasonable ... service, or regulations to be observed and enforced"); *E. Buchanan Tel. Coop. v. Iowa Utils. Bd.*, 738 N.W.2d 636, 642 (Iowa 2007) ("The authority of the [B]oard to make expressly delegated determinations affecting utilities and the public would be illusory if the [B]oard lacked the corresponding power to issue orders implementing them.").

Historically, traffic pumping was perpetrated by ILECs; however, the FCC has attempted to stop that practice by forcing ILECs to acknowledge they will not participate in traffic pumping as a condition to opt out of the NECA pool. *In re Investigation of Certain 2007 Annual Access Tariffs*, 22 F.C.C.R.

16109, 16118, 16120 ¶¶20, 28 (Rel'd Aug. 24, 2007). As a result, traffic pumping has shifted to CLECs such as Aventure and Great Lakes. To ensure that LECs (and at this time primarily CLECs) never again consider traffic pumping in Iowa, the Board's order should clearly state each of the ways that traffic pumping is unlawful and against the public interest. Thenceforward, the Board's order will be precedent to apply to any other Iowa LEC that has or will engage in traffic pumping. 199 IAC § 4.12. If the Board's Order is sufficiently strong, it will persuade other local exchange carriers in Iowa to avoid illegal traffic pumping in Iowa. However, if the Board's message is equivocal at all, the floodgates will open and traffic pumpers will find a refuge in Iowa. Great Lakes President Josh Nelson admitted as much, when he testified Great Lakes will expand its traffic pumping business if authorized by the Board. Tr. at 2466.

WHEREFORE, the Board should issue an Order that expressly states that the decision constitutes binding precedent that the Board will follow and apply to any other Iowa LEC it finds is engaged in traffic pumping. The Order should state that traffic pumping is illegal, is in violation of Iowa law, is an unjust and unreasonable practice, and violates the public interest and therefore the LEC Respondents shall:

- Immediately cease sharing access revenues with Free Calling Service Companies and to immediately disconnect the telephone numbers associated with such services;
- Immediately cease billing IXC's such as Qwest for switched access fees on FCSC traffic;
- Immediately cease traffic laundering;
- Represent to the Board, as a condition for retaining their certificates of authority from the Board,<sup>22</sup> that the LECs will not engage in traffic pumping, and in particular, will not allow for provision of adult content services on telephone numbers that cannot be blocked;

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<sup>22</sup> The Board has authority to set standards and requirements for the LECs to retain their certificates to "promote the public convenience and necessity." Iowa Code § 476.29(1), (9). *See also* Iowa Code § 476.101 ("A certificate of public convenience and necessity to provide local telephone service shall not be interpreted as conveying a monopoly, exclusive privilege, or franchise."). Indeed, the Board has express authority to determine whether competition in the telecommunications markets in Iowa is "fair" and "in

- As a condition of retaining their certificates as LECs, the Respondents must represent that they are no longer, and will not in the future, share access revenues with any FCSCs or with any other party.
- Acknowledge that if their switched access fees to an IXC increase more than 30% on an annual basis at any time in the future, the IXC is permitted to withhold payment of switched access fees for 60 days, and the Respondent is required to demonstrate to the IXC and the Board that Respondent is not participating in any traffic pumping scheme and that its rates are generating a rate of return within the authorized limits.
- Acknowledge that traffic pumping violates LECs' anti-discrimination obligations by the sharing revenues.

#### **VI. REASNOR'S COUNTERCLAIMS FAIL.**

Finally, Qwest responds to Reasnor's baseless counterclaims. Reasnor's counterclaims allege that Qwest unlawfully withheld payment of the access fees that are in dispute in this case; that Qwest discriminates among its customers by paying some to market Qwest services or to stimulate usage of Qwest services; and that Qwest unlawfully discriminates by providing discounted services to some customers and not to others. Reasnor's amended counterclaims are meritless: the evidence shows that Reasnor has neither law nor facts to support these counterclaims, and the Board should order that Reasnor's remaining counterclaims are denied in their entirety.<sup>23</sup>

Reasnor's unlawful self-help claim fails as a matter of law as they are devoid of any factual support whatsoever. There is no legal support for Reasnor's contention that Qwest's decision to withhold access charge payments was unlawful. As an initial matter, the LECs are all now stating that the Board should take pity on them because they have spent all of the money the long distance carriers paid them.

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the public interest." The Board also has authority to implement "uniform, reasonable standards for communications service provided by telephone utilities." 199 IAC § 22.1(1) (a & b).

<sup>23</sup> The counterclaims that Reasnor stated against non-party Qwest Corporation were dismissed by the Board's order of November 15, 2007. These were parts of Counterclaims II and III, and Counterclaim IV in its entirety.

Thus, without Qwest's so-called "self-help," it appears the LECs would have continued to spend their ill-gotten gain, *i.e.*, distribute to the knowing participants in the abuse, thereby causing greater damage to the IXC's. Moreover, Qwest and the other long distance carriers were lawfully justified in their decision to withhold payment, because the Respondents' tariffs did not apply to the traffic that they were billing to the IXC's. It is lawful to withhold payment of tariff fees when the carrier is disputing that the tariff applies:

INS' Amended Complaint alleges that Qwest's refusal to pay in accordance with the terms of INS' FCC Tariff and Amended FCC Tariff constitutes unjust, unreasonable, and unlawful self-help in violation of 47 U.S.C. § 201(b).

\* \* \*

To prevail on its self-claim, INS must prove Qwest unlawfully withheld payment due under the terms of valid and applicable tariff.

\* \* \*

In addition, unlike the defendant in the case cited by INS, Qwest filed with the IUB - the agency that regulates and supervises intrastate transport of telephone calls within the State of Iowa - its petition for declaratory ruling, and the Board held Qwest was not liable to INS for access charges, leaving to future negotiation the determination of any applicable compensation, thereby confirming the reasonableness of Qwest's actions.

In finding Qwest is not liable to INS under the Amended FCC Tariff, and that the original federal tariff is no longer applicable, it follows INS' self-help claim is likewise not applicable. Accordingly, the Court must grant Qwest's motion for summary judgment on this claim.

*Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 902-904 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8<sup>th</sup> Cir. 2006) (notes omitted). Given that the calls in question are not subject to the switched access tariffs, Qwest's decision to withhold payment was entirely proper.

The *INS* decision also fully accords with the Iowa law regarding self-help, which Reasnor cited in this counterclaim. For instance, the *INS* decision cited above specifically referenced *AT&T Communications of the Midwest v. Iowa Utils. Bd.*, 687 N.W.2d 554, 562 (Iowa 2004), the case relied upon by Reasnor in its counterclaim. *INS*, 385 F. Supp. 2d at 903 n.76. In that case, there was no dispute that the CLECs' access tariffs applied to the access traffic; the dispute was that the CLECs had filed tariff rates that were excessive. The CLECs also did not state a self-help claim based on the IXC refusing to pay; rather, the issue was that the IXC sought retroactive application of the Board's finding that the access rates were unlawful. *AT&T v. IUB*, 687 N.W.2d at 562. This case is on all-fours with the *INS* decision.

Qwest withheld payment of the access fees on FCSC traffic because the tariffs plainly did not apply to that traffic. The Board should accordingly deny Reasnor's claim of illegal self-help.

Reasnor's discrimination claims likewise fail. The premise of these claims is that Qwest offers benefits such as discounted services to some customers and others do not obtain the benefits. All of the evidence shows that Reasnor's counterclaims are baseless, and that they have never had a basis for these claims. Qwest posts a Rate and Service Schedule ("RSS") on its website. The RSS makes offerings to customers. Sometimes the RSS contains promotional offerings that all qualifying customers can take advantage of. This is exactly how the telecommunications industry is supposed to work. Virtually every customer purchases out of the RSS. However, when a retail customer and Qwest negotiate terms and conditions different than the RSS, Qwest posts the rates, terms and conditions for that agreement on its website at the following address: [http://tariffs.qwest.com:8000/0west Service Agreements/LD Xpl/LD FAQs/Index.htm](http://tariffs.qwest.com:8000/0west%20Service%20Agreements/LD%20Xpl/LD%20FAQs/Index.htm). This allows similarly situated customers to obtain the exact same contractual arrangements. Tr. at 1313-15. Thus, it is impossible for Reasnor to make a case of discrimination, because Qwest always posts its contractual terms and offers them to customers on a non-discriminatory basis. This is in stark contrast to the confidential agreements negotiated between the LECs and their FCSC partners.

It also appears that Reasnor is trying to argue that Qwest's Business Partners Program ("QBPP"), is somehow discriminatory. QBPP constitutes Qwest's outside sales force; participants in QBPP are not customers, they are an outside sales force. As explained by Ms. Hensley-Eckert in her rebuttal testimony:

A. QBPP is an external commissioned independent sales force which sells business products to third party customers.

**Q. WHAT IS THE PURPOSE OF QBPP?**

A. QBPP exists to sell business products to customers. These independent third party sales agents provide the leads to internal Qwest employees who then provision the orders.

**Q. WITH THIS PROGRAM, CAN THE QBPP SALES FORCE SELL THEMSELVES SERVICES AND RECEIVE A DISCOUNT?**

A. That is not the purpose of the sales force.

**Q. HOW IS QWEST'S BPP DIFFERENT FROM THE RELATIONSHIPS BETWEEN THE LEC-RESPONDENTS AND THEIR FCSC PARTNERS?**

A. The differences are huge. First, a commissioned sales force must make an actual sale to a third party customer. That end-user customer must sign up for services, and pay

their bill, which will be premised on tariffed rates. Only then would the QBPP sales agent receive a commission. The end-user will be paying for the services he or she receives; in stark contrast, here the LECs and FCSCs force the IXC to subsidize the FCSCs services so they can offer customers services for free. The FCSCs simply place a piece of equipment in a LEC central office and wait for the checks to roll in. Real end-user customers have a premises to which calls are delivered. These are just a few of the very significant differences. Thus, any attempt to compare QBPP with the LEC Respondents traffic pumping schemes are wildly off the mark.

Exhibit 1293 (Hensley Eckert Rebuttal) at 25-26. This testimony shows that QBPP cannot possibly discriminate between customers, because QBPP members are not customers. QBPP is a commissioned outside sales force. It also shows the significant differences with the LEC's illegal traffic pumping scheme. Accordingly, there is no unjust discrimination among Qwest customers.

Reasnor points to business arrangements that allow hotels and pay phone providers to generate additional fees by using Qwest as their operator services provider. Once again, this argument is wildly irrelevant. The offering that Reasnor complains about is tariffed. Tr. at 1312-13; Exhibit 1369. The tariff specifically references a "PIF" or property imposed fee that allows the hotel or payphone provider to charge a fee to the end-user who is making the call. Tr. at 1110. This revenue stream is not Qwest's; Qwest only retains its tariff charges. However, the tariff allows Qwest to charge the PIF, and pass it through to an agent who then pays the PIF to the property owner. Tr. at 1318-19; Exhibit 1370. The FCC has considered and approved these very type of arrangements. Tr. at 1328; Exhibit 1371. Ms. Hensley-Eckert discussed one of those FCC decisions at hearing:

Q. And do you see that it's entitled "In the Matter of AT&T Private Pay Phone Commission Plan"?

A. Yes, I do.

Q. If you turn to paragraph 20, do you see specifically where it ... differentiated between owners or tenants of the premises and, in paragraph 21, end users that make a call?

A. Yes. It basically says that section 203(c) (2), which is the anti-rebate provision, that rebates can't be given to an end-user customer, that the end-user customer in this instance is the user of the pay phone, not the pay-phone provider.

Q. And here in that section it talks about end users fully pay the tariff rate. Do you see that?

A. Yes.

Tr. at 1329; Exhibit 1354. Thus, this decision makes two points. It shows that the end-user on the operator services in question is the person making the call from the hotel room or pay phone. That person

is making a conscious choice to pay the fee, including the PIF. This is substantially different than the situation at hand where the IXCs are being asked to pay for services they neither want nor use, and the true end-users are obtaining the services (i.e., conference, pornographic chat, etc.) free of charge. Moreover, the FCC decision states that a payment back to the “end-user” would be an illegal rebate in violation of law. That is exactly what the LECs and their FCSC partners are trying to do here. They are claiming the FCSC are end-users, and then rebating huge sums of money to them. This is illegal, improper and in violation of Iowa law for all of the reasons Qwest has set forth in this brief.

Reasnor has utterly failed to prove its counterclaims. There is no basis to them whatsoever. The Board should deny them in their entirety.

## **VII. CONCLUSION**

The record evidence conclusively shows that the Board should grant the relief Qwest has proposed – namely, to find that Respondents’ traffic pumping violates their tariffs, violates several Iowa and federal statutes and regulatory rules and as such is an unjust and unreasonable practice, order the Respondents to refund the intrastate access fees that Qwest has identified, and require the Respondents to make the certifications that Qwest has proposed as conditions of retaining their certificates of authority. The record evidence also conclusively shows that Reasnor has not and cannot prove any of its counterclaims, and the Board should accordingly deny Reasnor’s counterclaims.

Dated: March 31, 2009.

Respectfully submitted,

by 

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**CERTIFICATE OF SERVICE**

Docket No. FCU-07-02

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